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COMMITTEE ANALYSIS OF EXECUTIVE ORDER 11246

(The Affirmative Action Program)

PREPARED BY THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

APRIL 1982

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CONTENTS

	Page
Foreword	v
Executive summary	VII
I. Introduction	1
A. Statement of the Problem	1
B. Purpose of the Study	2
C. Methodology	4
II. History of the Executive Order 11246 Program	7
A. Introduction	7
B. The Initial Executive Orders	8
C. Creation of the Affirmative Action Concept	10
D. The Present Compliance Program	12
E. Relationship to Other Federal Equal Employment Opportunity Activities	14
F. Congressional Oversight	14
III. Findings From the Hearings	24
A. Perceptions of the Executive Order Program and Its Achievements	25
1. Civil Rights Community	25
2. Contractors	27
3. Commonality of Perspective	28
B. OFCCP's Regulations and Their Administration	29
1. Agency Enforcement Techniques	29
2. Paperwork Requirements	32
3. Existing Targeting System for Selecting Contractors for Review	33
4. Compliance Standards	34
a. Determining Availability	35
b. Measurement of Underutilization	36
c. The Formation of Job Groups	37
d. The Monthly Manpower Utilization Reports	38
5. Hiring and Promotion Goals	39
a. Regulatory Requirements	40
b. Ramifications of a Numerical Requirement of Preference	40
6. Regulation of Academic Institutions	42
7. The Evolution of the Program's Objectives	44
8. The Monetary and Administrative Cost of Compliance	47
C. Legal Issues	48
1. Extent of Coverage	48
2. Relationship between the Responsibilities of OFCCP and those of EEOC	49
3. Back Pay and Other Retrospective Remedies Pursued Under Executive Order 11246	52
a. Title VII of the Civil Rights Act of 1964	54
b. Equal Employment Opportunity Act of 1972	54
c. Federal Property and Administrative Services Act	56
4. Legal Requirements Under Executive Order 11246 which Exceed Title VII	58
5. Status of Bona Fide Seniority Systems	59
6. Expedited Hearing Procedures	60
D. Summary of Findings and Conclusions	63

IV. Proposed Changes in the Administration of OFCCP and the Implementation of Executive Order 11246 — Page 69
A. General Regulatory Principles — 69
1. The Need for OFCCP — 69
2. Measuring Opportunities Not Procedures — 69
3. Encouraging Voluntary Programs — 70
4. Allowing for some Variation in Format Requirements — 70
5. Correlation between Size of the Contractor and Extent of Regulation — 71
6. Awareness of the Cost of Regulatory Demands — 72
7. Emphasizing Training or Other Activities Which Increase the Size of the Availability Pool — 72
8. A New Executive Order — 74
B. Specific Regulatory Recommendations — 74
1. Better Selection of Contractors for Review — 74
2. Use of Sequential Auditing Techniques — 75
3. Institution of Fair Jurisdictional Thresholds — 75
4. Incorporation of Flexible Standards of Measurement — 76
5. Goals Should Reflect Current Availability Not Ultimate Availability — 76
6. More thorough Training of OFCCP Personnel — 76
7. The Order's Sanctions Should be Instituted for Substantive Violations Not Procedural Disputes — 77
8. Better Protection of Confidential Data Submitted to OFCCP — 77
9. Eliminate the Expedited Hearing Procedures — 77
10. OFCCP's Requirements Should Not Exceed Title VII's Statutory Limitations — 77
11. OFCCP Should be made Prospective — 78
V. Conclusions and Recommendations — 79
A. EEOC Needs to Be Strengthened — 80
B. Reaffirmation that the Purpose of the Contract Compliance Program is to Increase the Number of Employment Opportunities for Minorities and Women — 80
C. The Contract Compliance Program Must Be Prospective — 80
D. The Need for Training Must be Given Priority — 81
E. An Effective Program Must be Inclusive — 81
F. An Effective, Equitable System for Selecting Contractors for Review Must Be Adopted — 81
G. The Program Should Not Exceed Statutory Requirements — 82
H. There Must Be a Reaffirmation of Good Faith Efforts As the Standard of Compliance — 82
I. The Standards Used in the Program Must be Flexible — 82
J. Data Requests Must be Based Upon an Identifiable Need and Must be Protected — 82
K. If Goals are to be Set and Underutilization Measured Based Upon Availability, then this Figure Should Represent "Current Availability" not some "Ultimate Availability" — 83
L. Hearing Procedures Must Be Established that Insure Both Quick Resolution of Disputes and Due Process of Law — 83
M. A Standard for Measuring the Program's Success Must Be Established — 83
N. A Procedure Must Be Established for Quick Termination of Unlawtul or Unnecessarily Burdensome Demands by Agency Personnel — 83
Appendix:
Senate Labor and Human Resources Committee's Pilot Study of OFCCP — 85

"I am not an advocate for frequent changes in laws and constitutions. But laws and institutions go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times."

—Thomas Jefferson.

FOREWORD

Keeping our government's institutions responsive to current needs is one of the most difficult challenges our rapidly changing society must constantly face. Compounding that challenge is the tendency for institutions to quickly become crystallized and preoccupied with pursuing their own existence, rather than the task for which they were created.

The Committee on Labor and Human Resources views its oversight responsibilities as a valuable vehicle for the renewing of our governmental institutions. For it is through this process that we can analyze before the American public how effective our institutions are in carrying out their original mandate—given today's conditions—and thus, breathe new life into them.

The Committee undertook a 12-month study of the Executive Order 11246 program as a serious effort to carry out its oversight responsibility and to renew its commitment to two important national goals: (1) to eliminate discrimination and (2) to increase employment opportunities for women and minorities. Because of the growing public polarization I felt compelled, as an elected official, to bring the issue before Congress for public debate, scrutiny and ultimately to seek solutions that would be consistent with our democratic principles.

This study represents a purposeful analysis of how effectively the Executive Order 11246 program has been administered by OFCCP in the past. It also includes recommendations for pursuing our stated national goals. The study was done in order to provide the Administration, our colleagues and all interested citizens with a blueprint for revitalizing those institutions established to eliminate discrimination and to improve employment opportunities for women and minorities. The study and a plan has been completed. What is needed is our collective leadership to make it a reality.

Senator Orrin G. Hatch,
Chairman, Labor and Human Resources Committee.

EXECUTIVE SUMMARY

An Analysis of the Executive Order 11246

The problem

There has been a growing polarization of the American public over "affirmative action," charges over lack of progress in hiring women and minorities, and an outcry against needless "over regulating" by the federal government.

Purpose of the study

The objectives of the study were twofold:

1. To evaluate the Office of Federal Contracts Compliance Programs (OFCCP) effectiveness in administering the Executive Order 11246 Program.

2. To develop answers as to how best the federal government can pursue two important national goals: (a) eliminate discrimination and (b) increase the employment opportunities for women and minorities (the initial intent of the Executive Order).

Methodology

A year long study of the Executive Order 11246 was launched in April of 1981, including five days of hearings. The objective of the first three days was to examine the effects of the regulations upon women, minorities and federal contractors. The last two days were to seek solutions for achieving our stated national goal. The hearings were well balanced with witnesses from women, minority, and business sectors giving their experiences and most important suggestions for achieving our national goals. Further study and review with the various interest groups resulted in this report.

Findings

The hearing revealed an inspiring commitment from Americans from all walks of life to the original intent of Executive Order 11246—to eliminate the barriers of employment discrimination and to increase employment opportunities for minorities and women. What was debated was not whether there should continue to be a federal investment in equal employment opportunity or in affirmative action. There was strong support for both. What was at issue was whether OFCCP's current regulatory program is capable of achieving the intent of Executive Order 11246 and whether this program is the most effective, practical and equitable method available.

Witnesses over the five days of hearings spoke of an agency in desperate need of repair. Contractors were presumed to be discriminatory before they were ever reviewed; regulations were unnecessarily arbitrary and the OFCCP was so poorly managed that its officials were able to twist these regulations so that only a few contractors were ever

able to satisfy the agency's demands. There also was a lack of a clear line of demarcation between OFCCP and EEOC. Consequently, compliance reviews overlapped compliant investigations and the two agencies seemed locked in a competition to see which could demand or win more from the private sector.

On the other hand, the testimony revealed that some of OFCCP's efforts have been effective and have succeeded in making more employment opportunities available to minorities and especially to women. It was made quite clear that where OFCCP had worked with federal contractors, the intent of the Executive Order was realized. OFCCP's greatest failures were those instances in which it sought to punish contractors, where it entered into compliance review with the outcome already predetermined.

The greatest tragedy of this program has been the needless ill will it has created against efforts to further opportunity for women and minorities and the waste. The government has wasted hundreds of thousands of dollars reviewing the same contractors again and again regardless of their record while contractors who are discriminating are left untouched. There is no excuse for this ill will and waste. It is simply a national shame.

Recommendations

This report concludes with a list of fourteen recommendations which, if adopted, would remedy most of the critical problems besetting the program. They address conceptual, administrative and practical issues because all three areas must be remedied if the program is to be revitalized. These recommendations are premised, however, upon three presumptions: (1) the need for a new Executive Order; (2) the need for an effective EEOC, and (3) the need for a strong federal commitment to equal employment opportunity. The first is necessary to resolve many of the legal and regulatory entanglements that would restrict any attempt to revise the existing structure. The second is necessary to insure that those who allegedly are discriminating have their day in court and if they are found guilty, that the discrimination is equitably, quickly and effectively remedied. The last is a prerequisite to any proposed revision, because no recommendation should in any way impair this nation's obligation to insure that all persons are treated equally.

It is our understanding that this Administration is already considering some of the recommendations we are proposing and we welcome their interest. We also strongly urge that they give serious thought to all fourteen, because each is dependent in various ways on the others. Moreover, steps such as we are proposing today must be taken if this program is to be revitalized. If they are not, then this Congress will have to consider whether it is time for it to face an issue it has avoided too long and enact a statutorily based federal contract compliance program.

SENATE LABOR AND HUMAN RESOURCES COMMITTEE.

I. INTRODUCTION

A. Statement of the Problem

Americans have grown increasingly polarized over "affirmative action" programs over the past few years. On the one hand, we see those who call for stronger enforcement, preferential treatment to overcome past discrimination, more punitive measures and further expansion of federal efforts in the American work force. On the other hand, we see those who cry "reverse discrimination" and oppose any federal effort in eliminating discrimination.

Today the American workplace is fraught with conflict not only between employer and employee but, as one witness at the Senate hearings said, "Having to protect yourself from your own government." At a time when this nation can least afford employee relations problems which decrease productivity, there is growing resentment between employers and employees.

Compounding the problem has been the "crazy quilt" of federal legislation, regulations and Executive Orders which have proliferated at an unprecedented rate over the past 17 years. A 1978 GAO report indicated there were over 87 statutes and regulations dealing with discrimination. Many of thes programs designed to implement the Executive Order and statutes now overlap each other and not only dissipate limited resources, but by their duplication, tend to work at cross purposes with each other.

Because government programs frequently lose sight of their unique mission in the scheme of improving opportunities for women and minorities, they frequently leave important functions undone. For example, the initial intent of the Executive Order 8802, signed by President Roosevelt in 1941, the forerunner of the Affirmative Action Program was to assure that Federal contractors would not discriminate on the basis of race, creed or national origin. Later, the program began to require the Federal contractors to take "affirmative action" to assure nondiscrimination and to actively seek out minorities and women for employment (see Chapter II for a complete history of the Executive Order program). The program was prospective in nature, calling for the development of employment opportunities—not focusing on past discrimination or seeking penalties and remedies. The Office of Federal Contract Compliance Programs (OFCCP) was given responsibility for administering the Executive Order. On another track, Congress passed the 1964 Civil Rights Act, designed to pursue claims of discrimination and provide remedies for victims of discrimination. Congress created the Equal Employment Opportunity Commission to carry out this mandate. However, today we have the two federal agencies originally designed to perform two distinct and important functions, merely concentrating on finding discrimination. As such, the limited goal the Executive Order program was designed to

pursue—the improvement of employment opportunities for women and minorities has been abandoned.

There is little question that women and minorities have not been well represented and that discrimination still exists in the American workplace.

The national goal of increasing the number of employment opportunities for women and minorities is still an important goal for which the government must strive. Equally important is the national goal of eliminating illegal discrimination and providing remedies for its victims. Neither goal should be neglected for the other.

Therefore, it is important that both of these agencies' programs be examined to see where they duplicate each other and to revitalize them, in order that they can pursue their respective missions without dissipating valuable resources.

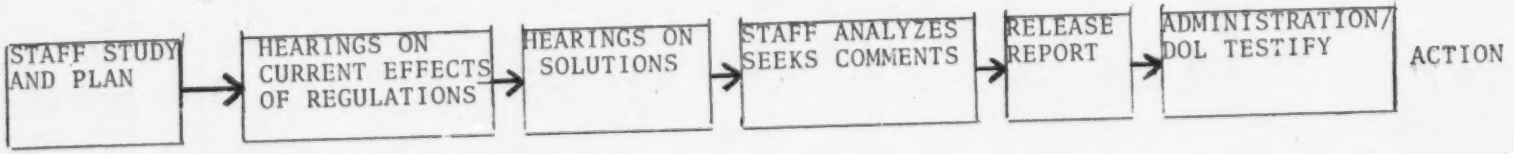
B. Purpose of the Study

1. WHY WE STARTED THE STUDY

Because of the Committee's concern over this problem and its commitment to preserving those two important national goals, the Committee launched a year-long analysis of Executive Order 11246, with the intent of making recommendations and taking action to pursue those national goals. (See Planning Flow Chart.)

SENATE LABOR AND HUMAN RESOURCES
ANALYSIS AND ACTION PLAN FLOW CHART
FOR E.O. 11246 PROGRAM

APRIL,1981 .JULY 29,30 OCT. 22 . DEC.8,10, DEC.81/MARCH 82 . APRIL 82 .MAY 82 .MAY 82



STAFF STUDY CURRENT PROGRAM. CONTACT WOMEN, MINORITY, BUSINESS GROUPS.

WITNESSES TESTIFY AS TO THEIR PERCEPTIONS OF THE CURRENT PROGRAM--
WOMEN
MINORITY
BUSINESS
COLLEGE/ UNIVERSITY

WITNESSES GIVE SOLUTIONS--
WOMEN
MINORITY
BUSINESS
UNIVERSITY

DRAFTS REPORT SEEK COMMENTS

SENATE

DESCRIBE THE PROBLEM, THEIR MISSION, GOALS, OBJECTIVES, AND WORK PROGRAM WITH TIMEFRAMES

2. WHAT WE WANTED TO FIND OUT

In designing the study, the following questions were formulated:

a. How effective is OFCCP in carrying out its mandate?

b. What has been the effect of the current regulations as perceived from three groups directly affected by the program, i.e., women, minorities and federal contractors.

c. Is OFCCP now duplicating functions for which EEOC is responsible for and if so, where?

d. How best can the federal government pursue two important national goals:

1. To eliminate illegal discrimination; and

2. Increase employment opportunities for women and minorities.

C. Methodology

An overall plan to study the OFCCP was designed which encompassed a 12-month span and which used the Committee's oversight responsibilities as the main vehicle for the study. Following are study steps which were taken:

1. Staff contacted minority groups, women's groups and business trade associations to inform them of the Committee's plan to study the Executive Order Program and to seek information from them.

2. Five hearings were planned which were divided into two sets. The first three days focused on reviewing the "current state of the art"—what have been the effects of the current regulations upon minorities, women and federal contractors. The second set encompassed two days and focused on solutions. Extensive requests went out for all interested parties to testify and/or submit testimony for the Committee to consider. Participants were requested to respond to the following question: "If we are committed to the national goal of improving employment opportunities for women and minorities, how best can we pursue that goal?"

3. Balanced testimony was solicited to assure that all sides of the issue were deliberated (see witness list).

4. In addition to testimony, staff held numerous meetings with various interested groups to seek their ideas and comments.

5. The Committee Chairman requested the Administration withhold publishing the "proposed OFCCP regulations." They were not withheld and were published on July 29. The recommendation was made to allow the Senate Labor and Human Resources Committee to study the matter and provide the Administration with a report on problems with the current program, if any, and to propose solutions.

Witness List for E.O. 11246 Hearings

FIRST DAY (CURRENT EFFECTS)—JULY 29, 1981

1. Robert Beck, Chairman, Prudential Insurance.
2. Jose Cano, President, American GI Forum.

3. Mechanical Contractors Association—Panel:
   a. Thelma Stevens Mrazek, Director of Communications.
   b. Frank Salatto, Jr., W. G. Cornell Co., Washington, Inc.
   c. Mrs. Alma Gaghan, Gaghan Plumbing Co.
4. Bank Panel:
   a. Stephen Glenn, VP, Bank of the West.
   b. Jack Smithwick, Senior VP, First American Bank of Nashville.
   c. Robert Hill, President, National Bank of Greenwood.

SECOND DAY (CURRENT EFFECTS)—JULY 30, 1981

1. Dr. Arthur G. Hansen, President, Purdue University, Lafayette, Ind.
2. Carol Burroughs Grossman, Women's Equity Action League (WEAL), Washington, D.C.
3. Estelle A. Fishbein, General Counsel, Johns Hopkins University, Brentwood, Md.
4. Frank Hammond, Director of Personnel Relations, Dow Chemical, Midland, Mich.; Patrick H. Estes, III, Manager, EEO Programs, Dow Chemical, Midland, Mich.
5. Althea Simmons, Director of Washington Bureau, NAACP, Washington, D.C.
6. James I. Nixon, Vice President, IT&T, New York, N.Y.
7. Juan Trijillo, Equal Opportunity Administrator, Petro-Lewis, Denver, Colo.

THIRD DAY (CURRENT EFFECTS)—OCTOBER 22, 1981

1. Robert Thompson, Chairman of Labor Relations Committee, U.S. Chamber of Comerce.
2. John Priest, Corporate Manager of Employee Relations, Boeing Co.
3. Robert Baumann, VP of Human Resources, The Mead Co.
4. Arnold Torres, League of United Latin American Citizens.
5. Susan Brophy, Chair, Women for Blue Collar Jobs, U.S.A., Women for Blue Collar Jobs.
6. Roger R. Blunt, President of Tyroc Corp., Minority Contractors Association.
7. Richard M. Chastain, VP of Civil Affairs, Morrison-Knudsen Co., Associated General Contractors.
8. John Bridge, President of Bridge Construction Corp., Associated Builders Contractors.

FOURTH DAY (SOLUTIONS)—DECEMBER 8, 1981

1. Barry Goldstein, Legal Defense Fund, NAACP.
2. Ronald M. Green, Sr. Partner, Epstein, Becker, Borsidy and Green.
3. Joseph Rauh, Americans for Democratic Action.
4. Dr. Walter Williams, Professor of Economics, George Mason University.

5. Dr. Nathan Glazer, Professor, Graduate School of Sociology and Education, Harvard University.
6. Jose Cano, American G.I. Forum.
7. David Copus, National Association of Manufacturers.
8. Maria Rouco, Director, Cuban National Planning Council, Inc.
9. Carol Grossman, Women's Equity Action League (WEAL).

FIFTH DAY (SOLUTIONS)—DECEMBER 10, 1981

1. James J. Graham, Chairman, EEO Policy Committee, Business Roundtable.
2. Michael Warner, Sevfarth, Shaw, Fairweather & Geraldson.
3. Dr. John Bunzel, Hoover Institution.
4. Dr. Paul Osterman, Professor, Boston University.
5. Day Piercy, Women Employed.
6. Carmen Estrada, Mexican American Legal Defense Fund (MALDEF).
7. Lawrence Lorber, American Society for Personnel Administration.
8. Elmo Sanders, VP of Personnel, Varian, American Electronics Association.
9. Dr. Bernice Sandler, American Jewish Committee.

II. HISTORY OF THE EXECUTIVE ORDER 11246 PROGRAM

A. Introduction

Executive Order 11246,[1] as amended by Executive Orders 11375 [2] and 12086,[3] establishes the principal equal employment opportunity obligations for federal contractors and subcontractors. Section 202 of the Order requires procuring agencies to insert a seven paragraph "equal opportunity clause" into each covered contract let by the agency.[4] Under the clause, contractors and subcontractors are barred from discriminating against employees and applicants on the basis of race, color, religion, sex, or national origin. At the same time, such employers must take affirmative action to employ and advance in employment all applicants and employees without regard to such factors.[5]

Responsibility for enforcement of the Executive Order mandate rests exclusively with the Secretary of Labor who administers the program through the Office of Federal Contract Compliance Programs (OFCCP).[6] Regulations promulgated under the Order interpret the equal employment mandate as creating a contractual duty for each employer "to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist." [7] Under this approach, nondiscriminatory selection and promotion policies standing alone will not ensure that the government contractor is in compliance with the Executive Order. Because a "deficiency" is defined in terms of statistical imbalances in a contractor's workforce, continued contractual relationships with the federal government are conditioned on the contractor providing minorities and women with a share of the existing jobs commensurate with their

[1] 30 Fed. Reg. 12319 (1965) ; 3 C.F.R. 169, 42 U.S.C. § 2000e.
[2] 32 Fed. Reg. 14303 (1967).
[3] 43 Fed. Reg. 49240 (1978).
[4] 41 C.F.R. § 60–1.4, 43 Fed. Reg. 49242 (1978). The equal employment clause may also be incorporated into the contract both by reference and operation of law. 41 C.F.R. § 60–1.4(d), (e), 43 Fed. Reg. 49243 (1978). *See United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459, 14 FEP Cases 1734 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978), *rea ,rmed in relevant part sub nom., United States* v. *Mississippi Power and Light Co.*, 638 F.2d 899, 25 FEP Cases 250 (5th Cir. 1981), *cert. denied*, 50 U.S. L.W. 3278 (October 13, 1981).
[5] The first paragraph of the clause prescribed by § 202 of the Executive Order provides that during the performance of the contract, the contractor agrees as follows:

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

[6] Prior to the issuance of Executive Order 12086 entitled, "Consolidation of Contract Compliance Functions for Equal Employment Opportunity," primary responsibility for enforcement of the program was spread among 16 compliance agencies with OFCCP exercising only general supervisory authority. *See* "President Signs Executive Order Consolidating EEO Functions in OFCCP," 195 Daily Labor Report A–11 (October 6, 1978).
[7] 41 C.F.R. § 60–2.10, 43 Fed. Reg. 49250 (1978).

representation in the labor force and/or population.[8] Since the imposition of corrective affirmative action obligations need not be connected to any showing of past or present discrimination on the part of the contractor, the contract compliance program as administered by OFCCP represents an effort to achieve a form of numerical parity between the percentage of those who are available for a type of job and are minorities and women and the percentage of those that actually hold such jobs who are minorities and women.[9]

B. The Initial Executive Orders

On June 25, 1941, President Roosevelt issued Executive Order 8802 requiring, as a "prerequisite to the successful conduct of our national defense production effort," that each defense contract contain a covenant whereby the contractor would agree not to discriminate against any worker on the basis of race, color, creed or national origin.[10] To monitor the implementation of the covenant, the Order established a five-member Fair Employment Practice Committee. The impact of the committee on the employment practices of Federal defense contractors, however, was minimal. As described by former Chairman Malcom Ross, "its mild sanctions were seldom applied . . . [it] simply had not been given the tools to do the job." [11]

Following the United States entry into World War II, Congress passed "An Act to Expedite the Prosecution of the War Effort" [12] and pursuant to that Act, President Roosevelt issued Executive Order 9001.[13] Under the Order, the War and Navy Departments as well as the Maritime Commission were granted authority to require a nondiscrimination clause in all war-related contracts. The Fair Employment Practice Committee continued to concentrate its efforts on drafting policies and conducting public hearings, but lost its autonomy when it was transferred to the War Manpower Commission. A dispute with the Chairman of the Commission ensued, and everal members resigned in protest. As a result, the Committee suspended operations in early 1943.[14]

In May 1943, Executive Order 8802 was superseded by Executive Order 9346,[15] which extended the reach of the nondiscrimination covenant to all government contracts, defense or otherwise, entered into by the War and Navy Departments and the Maritime Commission.

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[8] *See United States* v. *Operating Engineers, Local 701*, 14 FEP Cases 1400, 1407 (D. Ore. 1977) (E.O. 11246 requires contractors and subcontractors to undertake affirmative action to recruit and hire blacks in job classifications where they are otherwise underutilized as compared to relevant local population figures); *Associated General Contractors* v. *Altshuler*, 490 F.2d 9, 19, 6 FEP Cases 1013, 1020 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (equal employment obligations of a construction plan will necessarily move contractors to hire minority workers even though unqualified if sanctions are to be avoided).

[9] See generally Revised Order No. 4, 41 C.F.R. § 60–2, 43 Fed. Reg. 49249 (1978), Revised Order No. 14, 41 C.F.R. § 60–60, 43 Fed. Reg. 49266 (1978). See also Hearings on S. 2515, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. 77, 78 (1971); Nash, Affirmative Action Under Executive Order 11246, 46 N.Y.U.L. REV. 225, 229–230 (1971).

[10] 6 Fed. Reg. 3109, 3 C.F.R. 1938–43 Comp. 957.

[11] Ross, "Some Wartime Lessons on Ending Job Discrimination", the Washington Post, July 28, 1963 at E–3.

[12] Act of December 18, 1941, ch. 593, 55 Stat. 838.

[13] 6 Fed. Reg. 6787, 3 C.F.R. 1938—43 Comp. 1054.

[14] Bureau of National Affairs, the Equal Employment Opportunity Act of 1972 at 15 (1972).

[15] 8 Fed. Reg. 6787, 3 C.F.R. 1938–43 Comp. 1054. The authority for this Executive Order has been traced to the special war powers invested in President Roosevelt during World War II, and its terms were "directed toward enhancing the pool of workers available for defense production." *Coontractors Assoc. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 3 FEP Cases 395, 401 (3d Cir. 1971), cert. denied, 404 U.S. 854, 3 FEP Cases 1030 (1971).

Although the Order increased the Fair Employment Practice Committee's budget and staff, its enforcement efforts continued to be limited to negotiations, moral suasion, and the pressure of public opinion.[16] Nevertheless, several members of Congress were concerned that the Committee had never received an appropriation from Congress, being financed instead out of Presidential contingency funds. In 1944, Congress passed the Russell amendment which required Congressional approval of all funds for agencies established by executive order and in existence for more than one year. Although the Committee received two subsequent Congressional appropriations, the second was designated specifically for "liquidating its affairs." [17] The Committee remained intact, however, due to President Truman's signing of Executive Order 9664,[18] which continued its existence for the time periods and subject to the conditions set forth in the National War Agencies Appropriation Act of 1946.[19]

There was no further Executive action until the issuance of Executive Order 10210 in February 1951.[20] This new directive transferred to the Department of Defense the contracting authority detailed in Executive Order 9001, i.e., the provision that a non-discrimination clause would be deemed incorporated by reference in all defense contracts. Furthermore, the Order laid the groundwork for the expansion of the compliance program to other federal agencies engaged in defense-related procurement. By the end of August 1951, the following agencies had been granted the contracting authority to require a non-discrimination clause in their contracts:

Department of Agriculture.
Atomic Energy Commission.
National Advisory Committee for Aeronautics.
Government Printing Office.[21]
General Services Administration.[22]
Tennessee Valley Authority.[23]
Federal Civil Defense Administration.[24]
Defense Materials Procurement Agency.[25]

In December of 1951, President Truman signed Executive Order 10308,[26] establishing the Committee on Government Contract Compliance and assigning to it the duty of monitoring and enforcing compliance with the non-discrimination provisions required in all federal contracts. The Committee was also charged with studying the effectiveness of existing compliance programs. In a report which contained more than twenty recommendations, the Committee urged that the contracting agencies be given the authority to enforce the nondiscrimination clause, if conciliation failed, by terminating the contractor's

[16] U.S. Commission on Civil Rights, the Federal Civil Rights Enforcement Effort 142 (1970).
[17] R. Nathan, Jobs nad Civil Rights, the Role of the Federal Government in Promoting Equal Opportunities in Employment and Training, 88 (U.S. Commission on Civil Rights, 1969).
[18] 10 Fed. Reg. 15301, 3 C.F.R. 1943–48 Comp. 480.
[19] Public Law 156, 79th Cong., 1st Sess., approved July 17, 1945.
[20] 15 Fed. Reg. 1049, 3 C.F.R. 1949–53 Comp. 390.
[21] The first four agencies were included under Executive Order 10216, 16 Fed. Reg. 1815, 3 C.F.R. 1949–53 Comp. 732
[22] Executive Order 10227, 16 Fed. Reg. 2675, 3 C.F.R. 1949–53 Comp. 739.
[23] Executive Order 10231, 16 Fed. Reg. 3025, 3 C.F.R. 1949–53 Comp. 741.
[24] Executive Order 10243, 16 Fed. Reg. 4419, 3 C.F.R. 194–53 Comp. 752.
[25] Executive Order 10281, 16 Fed. Reg. 8789, 3 C.F.R. 1949–53 Comp. 781.
[26] 3 C.F.R. 1949–53 Comp. p. 837. The Order referenced the Defense Production Act of 1950, 50 U.S.C. § 2061 et seq., implying that in signing the Order, the President was acting pursuant to national defense powers to assure maximum utilization of available manpower.

existing contracts with the government and debarring it from future contracts.[27] This recommendation was not adopted during the Truman Administration, and the Committee dissolved when Executive Order 10308 expired in January 1953.

Eight months after taking office in January 1953, President Eisenhower issued Executive Order 10479,[28] establishing the President's Committee on Government Contracts. It was the first Executive Order of its kind that did not correlate explicitly contract compliance to defense production. Instead, it empowered the 15-person Committee,[29] to receive complaints regarding violations of the non-discrimination clause and to encourage the furtherance of an educational program "in order to eliminate or reduce the basic causes and costs of discrimination in employment." [30] As part of its educational function, the Committee was authorized to establish and maintain advisory relationships with state and local governments, as well as with non-governmental bodies, to facilitate its achieving an end to employment discrimination.

Executive Order 10577,[31] signed by President Eisenhower on September 3, 1954, revised the form of the non-discrimination provision required in federal contracts. It stated that the contractor's obligation not to discriminate extended to its subcontractors as well, and that the appropriate portions of its agreement to the stipulated non-discrimination provisions were to be posted.

Although neither of the Eisenhower Orders contained specific sanctions to be used in the case of non-compliance, the Government Contract Compliance Committee attempted, at one point, to adopt a firmer approach to non-complying contractors. In 1957, the Committee wrote to the heads of the various contracting agencies, advocating debarment of a contractor if conciliation failed to bring it into compliance. There is no record, however, of any agency actually using the proposed sanction during the remaining years of the Eisenhower Administration. Instead, it appears that most chose to rely upon the traditional methods of suasion and mediation.[32]

C. Creation of the Affirmative Action Concept

Two months after taking office, President Kennedy issued Executive Order 10925,[33] which replaced the Government Contract Committee with the President's Committee on Equal Employment Opportunity. Chaired by then Vice-President Johnson, the Committee was empowered to assume jurisdiction over any complaint alleging a violation of the Order and to conduct compliance reviews of government contractors. It had final authority over the imposition of sanctions and could cancel the existing contracts of, or debar from future contracts, those contractors found in violation of their non-discrimination clauses. Furthermore, the Committee was to be provided with

[27] The Federal Civil Rights Enforcement Effort at 142.
[28] 18 Fed. Reg. 4899, 3 C.F.R. 1949–53 Comp. 961 (1953).
[29] Nine members of the Committee were chosen by the President, and the others were individual representatives from the Atomic Energy Commission, the Commerce Department, the Defense Department, the Department of Justice, the Labor Department, and the General Services Administration.
[30] Executive Order 10479, § 6.
[31] 19 Fed. Reg. 5655, 3 C.F.R. 1954–58 Comp. 203 (1954).
[32] President's Committee on Government Contracts, Five Years of Progress, 22 (1958); Fourth Annual Report on Equal Job Opportunity, 6–7 (1957).
[33] 26 Fed. Reg. 1977, 3 C.F.R. 1959–63 Comp. 488 (March 6, 1961).

all pertinent employment records and statistics on the composition of the contractor's workforce to aid in its compliance review function. In 1963, a second Order by President Kennedy made Federal and Federally assisted construction projects subject to the Executive Order prohibition.[34]

There was little that was new in Executive Order 10925. It embodied many of the recommendations voiced by President Truman's Committee on Government Operations,[35] and continued the policy of relying heavily upon Executive action in the area of civil rights.[36] The Order is significant, however, in that it added the following stipulation to the non-discrimination clause required in all government contracts:

> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.[37]

It should be noted that in its initial use, the concept of "affirmative action" was not limited to minorities and women, but instead was defined as the appropriate means for assuring all persons of the right to be employed and to be treated equally during employment. Its application was not associated specifically with the correction of minority or female underrepresentation in the contractor's workforce, and in fact, nowhere in the Order were the terms "minorities" or "women" mentioned. Unfortunately, while the scope and purpose of the concept were delineated expressly, no explanation of what was to be considered affirmative action was included.

In a formal opinion concerning Executive Order 10925,[38] then Attorney General Robert F. Kennedy based the President's right to require the inclusion of a nondiscrimination clause in government contracts upon the power of the Executive to contract in a manner and on terms which it considers appropriate with its constitutional and statutory responsibilities, except where there is legislative action to the contrary.[39] He further noted that in exercising this power, the government and the Executive have the authority to consider and implement the public policies of the United States, and that both the courts and Congress have recognized the fundamental policy that the powers of the government should not be used to promote or perpetuate discrimination against any person.[40] Finally, he found support for the clause in the public policy that there be the fullest and most effective use of the nation's manpower resources and in the general acquiescence of ten successive Congresses.[41]

With the passage of the Civil Rights Act of 1964,[42] Congress entered the field of equal employment opportunity. The Act refers to the Executive Order program only once. In the section entitled "Investigations, Inspections, Records, State Agencies," it exempts those contractors who have complied substantially with Executive Order require-

[34] Executive Order 11114, 28 Fed. Reg. 6485, 2 C.F.R. 1959–63 Comp. 774.
[35] The Federal Civil Rights Enforcement Effort at 143.
[36] Nathan, supra note 17, at 88.
[37] Executive Order 10925, pt. III, § 301(1) (emphasis added).
[38] Opinion of the Attorney General of the United States, Vol. 42, Op. No. 21, dated September 26, 1961; released for publication October 28, 1963.
[39] *Id.* at 4. The opinion cited a list of cases covering approximately one hundred years, ending with *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 116 (1954).
[40] Op. No. 21, supra note 38, at 5–6, *citing, inter alia*, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940); *Shelly* v. *Kraemer*, 334 U.S. 1 (1948); *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944); 42 U.S.C. § 1981.
[41] Op. No. 21, supra note 38, at 9–10.
[42] 42 U.S.C. § 2000e et seq.

ments from filing additional employment records with the Equal Employment Opportunity Commission.[43] This provision was removed when the Act was amended in 1972 and replaced by the stipulation that EEOC consult with other interested state and Federal agencies and endeavor to coordinate its requirements with these other groups.[44] Also added in 1972 was Section 718, which stated that any federal contractor that had had its affirmative action plan approved by the government within the previous 12 months could not be passed over prior to a full hearing.[45]

D. The Present Compliance Program

The basis of today's contract compliance program was established with the signing by President Johnson of Executive Order 11246 in September 1965.[46] The Order retained the affirmative action obligations and nondiscrimination prohibitions of the Kennedy Orders, and more significantly, it transferred the responsibility for administering the compliance program from the Vice-President to the Secretary of Labor.

Like its predecessors, Executive Order 11246 did not include a definition of "affirmative action." Nor was the term defined in 1966 when the Office of Federal Contract Compliance (OFCC) was created to administer the compliance program, or in 1967, when Executive Order 11375 [47] added sex to the list of the kinds of prohibited discrimination. In a statement in January 1967, Edward C. Sylvester, Jr., Director of OFCC, commented:

> I would say that in a general way, affirmative action is anything that you have to do to get results. But this does not necessarily include preferential treatment. The key word here is "results" . . .
>
> Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation. . . .[48]

Affirmative action began to take on its more contemporary attributes with the issuance of Department of Labor regulations concerning the implementation of Executive Order 11246 in May 1968.[49] They required each non-exempt contractor with more than fifty employees and a government contract valued at $50,000 or more to develop a written affirmative action program (AAP) for each of its establishments. These programs had to include the identification and analysis of minority employment "problem areas" within an employer's work force and, where there were deficiencies, goals and timetables were to be established for the prompt achievement of full and equal employment opportunity. Part of the program was to be called the Utilization Evaluation. It would contain an analysis of minority group representation in all job categories, of present and past hiring practices, and of upgrading, promotions, and transfers.[50]

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[43] 42 U.S.C. § 2000e–8(d).
[44] 42 U.S.C. § 2000e–8(d), as amended by Pub. L. No. 92–261.
[45] 42 U.S.C. § 2000e–17.
[46] 30 Fed. Reg. 12319 (1965), supra note 1.
[47] 32 Fed. 14303 (1976).
[48] Nathan, supra note 17, at 93.
[49] 41 C.F.R. § 60–1, 33 Fed. Reg. 7804 (1968).
[50] Id.

After problems arose over the proper interpretation of many of the crucial terms used in the regulations, the Department of Labor two years later tried to resolve the problems generated by the first set of regulations by issuing a second. Known as Order No. 4, these new rules were designed to give a contractor guidance on how to comply with the Executive Order program. They stipulated that an affirmative action plan must include:

> [an] analysis of areas within which the contractor is deficient in the utilization of minority groups and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and thus to achieve prompt and *full* utilization of minorities at all levels and in all segments of his work force where deficiencies exist.[51]

The regulations also noted:

> [an] affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate.[52]

Thus, the compliance program had become a vehicle for establishing and monitoring preferential treatment in the employment practices of federal contractors; in effect, the mandate for "equal employment opportunity" was administratively shortened to "equal employment." Nevertheless, OFCCP has continued to assert that remedying statistical imbalances in employment is not preferential treatment:

> The various references in the consideration of this case to the necessity of action regarding "Negroes" or "minority group members" is seriously misunderstood if it is misconstrued as requiring preferential treatment of any kind. The point is that action is necessary to assure that all persons receive equal opportunity. Where some have not, it is ridiculous to misinterpret as "preferential treatment" the requirement that the inequity which has developed with respect to them be corrected.[53]

Today, the Office of Federal Contract Compliance Programs (OFCCP), renamed after its responsibilities were extended to include the administration of compliance programs for handicapped workers, Vietnam-era and disabled veterans, is responsible for monitoring the affirmative action plans of an estimated 325,000 companies.[54] Until 1978 OFCCP, while retaining general supervisory authority, had delegated the primary responsibility for enforcement of the compliance programs to sixteen compliance agencies which were part of federal departments or administrative agencies. However, President Carter issued Executive Order 12086 [55] effective October 8, 1978, which consolidated federal contract compliance authority for administration of Executive Order 11246 within the Department of Labor.[56]

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[51] 41 C.F.R. § 60–2.10 (1970) (emphasis added).

[52] Id. Order No. 4 was revised on December 4, 1971 .See 35 Federal Register 2586 (1971). The revisions retained these significant changes to the program and clarified the factors to be used in determining availability. Today, this portion of the regulation is known as Revised Order No. 4.

[53] In the Matter of Allen-Bradley Co., Sec. Labor Dec. No. 101–68, January 16, 1969, reprinted in G. Ginsburg, Cases, and Materials on Equal Employment 789 (3rd ed., 1976) (emphasis in original).

[54] Hearing record, p. 1386.

[55] 43 Federal Register 49240 (1978).

[56] *See* "Consolidation of EEO Compliance Functions in OFCCP," 99 Labor Relations Reporter 121 (BNA, 1978).

E. Relationship to Other Federal Equal Employment Opportunity Activities

Although the Executive Order program pre-dates most non-discrimination regulations and statutes, its presence in no way has restricted the growth of the burgeoning civil rights industry. In 1978, the General Accounting Office identified in 1978 87 laws and executive orders covering non-discrimination issues 65 of which affected employment practices. Forty-seven of these covered race, while forty-three dealt with sex discrimination.

It must be noted, however, that in addition to this plethora of federal rules, most state and local jurisdictions have promulgated executive orders, laws, or ordinances requiring non-discrimination in employment. Since federal statutes do not include a preemption provision as in other areas of law, a would-be complainant has a virtual smorgasboard of laws and orders which can be used to sue employers. Simultaneous suits are the rule not the exception in employment discrimination litigation.

The consequences of this duplication are, unfortunately, quite predictable. For example, the First Alabama Bank of Montgomery was sued by the EEOC in 1969. The litigation culminated in a court order pursuant to which the court monitored the EEO activities of the bank through quarterly compliance reports. The reports were filed for more than six years until the court determined in August of 1979 that they no longer were necessary. During the reporting period three E.O. 11246 compliance reviews were conducted, all of which resulted in determinations that the bank was in compliance. Three months following court termination of the reporting requirement, OFCCP commenced yet another compliance review which would have encompassed many of the same issues involved in the Title VII litigation and earlier compliance reviews.

Regardless of the merits of the case, it is a troubling example of how the government can misuse the duplicate characteristics of federal requirements. Government activities, such as these, do little to foster equal employment opportunity but do serve as a constant point of contention between the federal bureaucracy and employers. Businesses and industries have become understandably frustrated with their inability to resolve complaints. Settlement of an issue under one statute is no guarantee that it can not be brought up under another. In short, the proliferation of means to remedy discrimination has begun to demoralize public support for civil rights statutes and has generated a negative reaction to the objectives of both Title VII and Executive Order 11246.

F. Congressional Oversight

1941 to 1961

The Executive Order program was started by Roosevelt's Administration outside the purview of Congress. Involvement by Congress only came about in 1944, because it was concerned with the method of funding the program. It was this concern which prompted the passage

of the Russell Amendment, calling for "liquidating its affairs." [57] President Truman, however, continued the program.[58]

During the subsequent administrations of Truman and Eisenhower, Congressional review was conducted only through the appropriations process. Review of the appropriations hearings for this period reveal that the Executive Order program was essentially prospective in nature and that as such, received minimum scrutiny from the public or the Congress.

1961 TO 1971

During this turbulent period, Congress began to take a more active role in overseeing the Executive Order program, due to the public's concern with developing civil rights legislation which would address discrimination against American minority groups and blacks, in particular.

In the 1963 hearings, Mr. Hobart Taylor, Executive Vice Chairman of the President's Committee on Equal Employment Opportunity, testified before the House Committee on the Judiciary and recounted the Executive Order authority to enforce non-discrimination by the imposition of sanctions. These sanctions included terminating the contract of noncomplying contractors, declaring noncomplying contractors ineligible for future government contracts, and directing agencies not to enter into contracts with bidders who were not evidencing satisfactory compliance with the Order. His testimony indicated that the Committee might also request the Justice Department to seek judicial relief from violations.[59] No evidence exists, however, that such powers were actually utilized.

In discussing the passage of the Civil Rights statute and the importance of "affirmative action" in implementing the national policy, Mr. Taylor said that finding discrimination and debaring contractors is not enough to create equal opportunity in America. He said:

> You have to have some procedure for finding a fellow guilty, but you have to have another approach to it other than finding him guilty, if you want to bring about this vast change we need.
>
> So this is why I say that I would want to reflect upon the possibilities of broadening the scope of this thing and working out some ways in which you could have advisory groups from industry and advisory groups from labor and giving them standing, and things of that sort, in order to help deal with this overall problem; but of course, you have to present people with what you might consider to be a business proposition if you want them to get to it, get started on something.[60]

In passing the Civil Rights Act of 1964, Congress considered coordination of functions between the Equal Employment Opportunities Commission and the Executive Order requirements when it exempted contractors who have complied with the Executive Order requirement from filing additional employment records with the Commission,[61] a provision which was removed when the Civil Rights Act was

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[57] Congressional Record. Vol. 90. Part 5, pp. 5940, 6022–6039, 6148, 6175, 6244–6264.
[58] See Executive Order 9664. 1945.
[59] Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States before the Subcommittee No. 5 of the House Committee on the Judiciary, 88th Congress, 1st Session (1963).
[60] Ibid., p. 1129.
[61] 42 U.S.C. § 2000 e–8(d).

amended in 1972.[62] Some evidence exists that Congress considers attaching a general non-discrimination statute to the authorities granted under the Executive Order. However, such consolidation was not effected.

After passage of the act, the House Appropriations Committee heard testimony regarding the Executive Order program during the annual agency budget review.[63] Congressional interest centered around workload projections and budget costs based on increases in the contractor universe and the number of complaints filed. Nonetheless, the orientation of the Executive Order program, as it is described during the hearings of this period, was essentially prospective in nature and based on the encouraging of voluntary compliance.

In 1968, the Contract Compliance program began to move away from encouraging voluntary compliance toward finding discrimination, and an accusatory tone begins to dominate the hearings.

Mr. Sylvester, Director of the Contract Compliance programs, testified before the House Appropriations Committee in 1968, as to a shift in policy. He stated:

> During the past two years, this program has moved steadily from an education and voluntary compliance activity to one of the enforcement of Federal contracts. This principle has taken hold within the contracting agencies and among Federal contractors, and the results in providing equal employment opportunity are impressive.[64]

In 1969, the House Appropriations Committee heard, for the first time, testimony by describing "cancelation, suspension and debarment" under the Executive Order.[65] Although the contracting agencies were previously authorized to debar, this marks the first time that such actions were actually taken.

Undoubtedly the most significant and revealing Congressional activity of the period were the hearings before the Subcommittee on Administration, Practice and Procedure of the Senate Committee on the Judiciary, in which the Subcommittee heard criticisms regarding enforcement of the Executive Order program by the House Democratic Study Group and the U.S. Commission of Civil Rights. These groups submitted for the record, letters to then President Nixon and Secretary of Labor George Schultz, criticizing the Executive Order program as being seriously disregarded by the Administration and vague and ineffective in its instruction to contractors. The testimony also rings with expectations on the part of civil rights groups that the Executive Order program be administered in an aggressive and punitive manner. The following examples are taken from testimony submitted by the U.S. Commission on Civil Rights:

> In the past year, the Office of Federal Contract Compliance has made several significant steps forward in this program. OFCCP reported, for the first time, to the debarment sanction, commencing proceedings to debar five contractors

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[62] 42 U.S.C. § 2000 e–8(d) as amended by Public Law No. 92–261.

[63] Hearings on the Departments of Labor and Health, Education and Welfare Appropriations for 1964 through 1968, before the Subcommittee on Departments of Labor and Health, Education and Welfare and related Agencies of the House Committee on Appropriations, 91st Cong., 1st Session (1965–1969).

[64] Hearings on the Departments of Labor and Health, Education and Welfare Appropriations for 1969, before the Subcommittee on Departments of Labor and Health, Education and Welfare and related Agencies of the House Committee on Appropriations, 90th Congress, 2nd Session (1968), p. 880.

[65] Hearings on the Departments of Labor and Health, Education and Welfare Appropriations for 1970, before the Subcommittee on Departments of Labor and Health, Education, and Welfare and related Agencies of the House Committee on Appropriations, 91st Congress, 1st Session (1969).

from further government contracts for noncompliance with the Executive Order. Other important advances have been the requirement for written plans of affirmative action and the requirements for nondiscrimination in testing and other screening procedures. These policy advances should be implemented aggressively in the future.[66]

Perhaps the main reason for this failure is that contractors have not had to take seriously the threat of sanctions for noncompliance, no contract has ever been terminated. Thus, a major weapon necessary to establish the credibility of the Federal Government among government contractors has never been used.[67]

"Volunteerism," which has characterized most of the life of contract compliance, means seeking to achieve compliance through persuasion and voluntary cooperation by the employer. This approach is useful in its place, but if any one fact emerges clearly from the history of Federal contract compliance, and indeed, civil rights generally, is that unless constructed upon a backbone of strict enforcement, volunteerism easily becomes an excuse for inaction.[68]

The testimony recounted exemplifies a marked change in the tone and attitude toward the implementation of the Executive Order Program, which has, ever increasingly, continued to characterize the program to this day.

Beginning with the testimony heard in Congress in 1970 and 1971, the attitude of the Administration and of the Congress itself seems focused on finding and punishing those guilty of discrimination through the authority granted under the Executive Order Program.

An explanation for this shift in policy is provided by John L. Wilks, then Director of OFCC under President Nixon.

There is, . . . a need to evaluate the progress of the total contract compliance activity in achieving the goal of equal opportunity and to report such progress to the public.

The program, at present, does not have the means to evaluate accurately the extent to which equal opportunity is being accomplished. Additionally, the minority community and the general public tend to assess the progress or lack of progress of Government's equal opportunity program by such factors as the number of contract cancellations or the number and magnitude of public demonstrations, riots and other forms of racial unrest. These misleading evaluation factors should be counter-balanced by an accurate reporting of full number and character of new job opportnuities created for minorities and an evaluation of the extent to which the gap in employment under-utilization of minorities is being closed.[69]

1971 TO 1981

The major interest in Congressional Oversight at the turn of the decade, centered around the need to amend the 1964 Civil Rights Act. The hearings prior to the passage of the amendments reveal extensive consideration being given to the duplicity of the government's approach to the implementation of Title VII of the Civil Rights Act and the Executive Order Program. Clarence Mitchell, Director of the Washington Bureau of the NAACP, testifying in the House, recommended the transfer to the EEOC, the authority of the Office of Fed-

[66] Hearings on the Practices and Procedures involved in the implementation of Executive Order 11246 and Related Laws, Regulations and the Constitutional Provisions concerning Equal Employment Opportunity in Federal and Federally Assisted Contracts before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 91st Congress, 1st Session (1969), p. 316.

[67] Id., p. 317.

[68] Id., p. 318.

[69] Hearings on Department of Labor and Health, Education, and Welfare Appropriations before a Subcommittee on Departments of Labor and Health, Education and Welfare and Related Agencies of the House Committee on Appropriations, 91st Congress, 2nd Session (1970), p. 531.

eral Contract Compliance to enforce non-discrimination under the Executive Order authority. In testifying, he said:

> . . . the victims of discrimination must wade through a virtual sea of uncertainty when they seek redress. Even the parties who are charged with discrimination cannot be sure of what course of action they should follow because there is always the possibility of overlapping between EEOC and OFCCP.[70]

Mr. Thomas Harris, Associate General Counsel, AFL–CIO, also testified in favor of the transfer of both functions to the Equal Opportunity Commission, in order to eliminate "multiple overlapping and conflicting remedies; . . . these multifarious remedies and forums are not mutually exclusive, and our unions are sometimes burdened and harrassed by a multiplicity of simultaneous or successive proceedings." [71] Both the House and Senate versions of the original bills introduced, included provisions for a transfer.[72] Representative Hawkins pointed out in the hearings that the transfer would make possible coordination of enforcement effort and would make those subject to Title VII responsible to one agency instead of several:

> By centralizing these in a single agency, we achieve coordination, clarity and consistency in defining discrimination and in shaping a proper remedy. And we feel litigants from a multiplicity of suits, confusion over the intent and requirements of the law, and duplication of inspection and record keeping.[73]

The agencies involved provided the strongest testimony opposing the transfer of functions. Mr. Lawrence H. Silberman, Under Secretary of Labor, testified in opposition to transferring the responsibilities of the OFCC to the EEOC. He stated that OFCC and EEOC have different objectives:

> The two programs EEOC and OFCC are substantially different. Transfer can only do injury to both.[74]

Mr. Silberman's arguments for the retention of the Executive Order function with the Department of Labor, included a contention that an executive agency can better coordinate contract compliance agencies than an independent agency; that compliance activity requires cooperative labor-management relations, that compliance activity must assure manpower training, and that the Department has the capability to coordinate manpower training and compliance activity.[75]

Senator Saxbe, speaking from the Senate floor, offered a last minute amendment to the Committee bill, which eliminated the section transferring the function of the Office of Federal Contract Compliance under Executive Order 11246 to the EEOC. In doing so, he stated that to be effective, the contract compliance program must remain part of the procurement process.[76] The Senate agreed to the Saxbe amendment by a vote of 49 to 37.[77]

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[70] Hearings on Equal Employment Opportunity Enforcement Procedures, H.R. 6228 and H.R. 13517 before the Subcommittee on Labor of the House Committee on Education and Labor, 91st Congress, 1st Session (1969–1970); p. 111.

[71] Id., p. 178.

[72] H.R. 6228 and H.R. 13517, 91st Congress, 1st Session, 1969; S. 2453, 91st Congress, 2d Session, 1970.

[73] Congressional Record, Vol. 117, Sept. 15, 1971, p. 319664 (remarks by Representative Hawkins).

[74] U.S. Congress, Senate Committee on Labor and Public Welfare Equal Employment Opportunities Enforcement Act of 1971. Hearings on S. 2515, S. 2617, H.R. 1746, 92nd Congress, first session, October 4, 6, 7, 1971 p. 80.

[75] Id.

[76] Congresional Record, Vol. 118, Jan. 26, 1972, p. 1385, 1386 (remarks from Senator Saxbe).

[77] Id., p. 1398 (record of votes).

Perhaps the most insightful explanation of whether needless continuation of separate functions is provided by Mr. Clarence Mitchell, Director of the Washington Bureau of the NAACP:

> Unfortunately, there has been a considerable amount of selfish activity by those who want to keep the OFCC function separate from the EEOC . . . to say the power to cancel contracts is more important than the orderly system that we support is, at best, a grossly misleading argument, and at worst, a thinly disguised effort by those in office to hold on to a function for purely selfish reasons.[78]

The final bill amending the Civil Rights Act, provided for a coordination of EEOC and OFCCP functions through the establishment of an Equal Opportunity Coordinating Council. Although the Council was charged with the responsibility of reaching uniform or consistent policies on issues involving the administration or enforcement of the various EEO laws, problems relating to coordination of the functions continued to come before Congress throughout the decade of the seventies.

In 1975, the House Subcommittee on Equal Opportunities of the Committee on Education and Labor, conducted oversight hearings on the Federal Enforcement of Equal Employment Opportunity Laws.[79] Secretary Dunlop, testifying in behalf of the Department of Labor, attempted to clarify for the Committee the differing requirements under the Affirmative Action Concept and the non-discrimination concept. He describes the Executive Order obligation as essentially prospective in nature, an obligation to act affirmatively, irrespective of a finding of non-discrimination. In speaking to this point, he says:

> . . . since the enactment of Title VII, we have a statute that applies to every one that precludes discrimination and sets up a legal procedure for enforcement.
>
> Now under the Executive Order, there is an obligation for affirmative action, but there need be no funding of discrimination at all. There may be indeed no conceivable finding of discrimination and yet, under the Executive Order, the obligation to carry on affirmative action is required of all contractors.
>
> . . . In a sense the Executive Order Program, as the history suggests, originated first. There was no generalized authority to compel non-discrimination and to provide remedies for discrimination. So the Government used its contracting authority. Subsequent to that, we had a statute which applies to everybody which is Title VII and the other matters which I referred to.
>
> I am suggesting to you that the full congruence of the statute which precludes discrimination, and presumably, therefore, as remedy creates affirmative action, is sometimes difficult for people to separate from the affirmative action that is required under the Executive Order without any showing of discrimination at all.[80]

It is apparent, from the testimony of the hearings conducted throughout the period of 1971 to 1981, that the public and particularly the Civil Rights Groups, saw the Executive Order Obligation essentially as one investigating and finding the presumed discrimination of federal contractors, and punishing them through the withdrawal of contracting privileges. This attitude was brought continually before the Congress during these years. In fact, there are few examples of

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[78] Hearings on Equal Employment Opportunity Enforcement Procedures, H.R. 6228 and H.R. 13517, before the Subcommittee on Labor of the House Committee on Education and Labor, 91st Congress, 1st Session (1971), p. 111.

[79] Hearings on the Federal Enforcement of Equal Employment Opportunity Laws, before the Subcommittee of Equal Opportunities of the House Committee on Education and Labor, 94th Congress, 1st Session (1975).

[80] Id., p. 124, 125.

opposing views heard in the testimony received, and only in a very limited sense can it be said that the "accused" appeared to testify in their own behalf. By and large, the persons who came to speak before Congress represented only the interests of civil rights groups. The tone of these hearings clearly reflect the presumption of guilt on the part of government in punishing the guilty. Increasingly, it appears from the testimony that the publics' measurement of success in the Executive Order Program depended on the number of contractors who were debarred, and more recently, on the number of persons who were awarded backpay as a result of the compliance reviews. Phrases like "enforcement arsenal," and "government's strongest weapon," are continually used to characterize the program.[81]

In the years proceeding 1975, the Contract Compliance Agency has continued to appear before Congress, not to request budget to implement affirmative action, but budget to hire persons to identify discrimination, conciliate remedies and to evoke sanctions.

The history of Congressional oversight in the 1970's reveals an increasing preoccupation on the part of government and Congress with more and more sophisticated means to identify discrimination, and appropriate remedies in the form of such things as back pay and retroactive seniority, etc. The record of hearings conducted in the House Subcommittee on Equal Opportunities in 1976, include statements by Lawrence Lorber, Deputy Assistant Secretary for the Office of Federal Contract Compliance, expressing the view of the Ford Administration towards the role of the Executive Order Program and the 1976 proposed regulations as follows:

> . . . We believe, the program must direct itself toward reviewing and curing those systematic forms of discrimination which are in existence in the employers' practices, policies and procedures.
>
> . . . So we said in the regulations that have there are substantive equal employment issues, issues such as the extent of affected class issues on what remedies are owing to this class, we will take the contractor to a hearing and we will invoke the sanctions and remedies of the Executive Order.
>
> . . . I caution again, what we are really saying, is that we believe this program should direct itself toward remedial ends. And to that end, we believe it is imperative that the demands and progress made by the Government in this program be done in a fashion where they will sustain subsequent challenge.[82]

When asked about the main thrust in achieving conciliation with contractors who have been reviewed, Mr. Lorber stated:

> In our view, one view, certainly not the prime, but an easier peg to hang your hat on might be the amount of back pay received by employees who may be owed back pay due to past discrimination. To that extent, we took a survey of the agencies which recovered back pay during the last year and a half without any Title VII or other factor involved, simply under the Executive Order. We received several hundred conciliation agreements in which back pay has been awarded to employees.
>
> . . . Very significant and substantive benefits accrued to the employees in terms of their various work . . . What I am talking about now is basically to those employees who are currently in the employ of the contractors. For those in other areas, we use the goals and timetables device, both the remedial and prospective device in which the contractors set goals and, therefore, has to undertake efforts to bring into the employment area employees who have not yet been there.[83]

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[81] Id. at p. 75 (see hearings).

[82] Hearings on the Federal Enforcement of Equal Employment Opportunity Laws, before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Congress, 2nd Session (1976), p. 42, 43.

[83] Id. p. 55.

The House Staff Report on Oversight investigation of Federal Enforcement of Equal Employment Opportunity Laws expressed a need that is reiterated throughout the testimony in the decade of the seventies and continues to be a problem in the decade of the eighties.

> The regulations issued by the Department of Labor implementing the Executive Order are written in such a manner as to discourage effective enforcement. Continued revisions over the history of the program have produced a patch work of directions to employers and compliance agencies which are at once vague, complex, cumbersome and inconsistent with each other and the Executive Order.
>
> The Subcommittee found that the Department of Labor had failed to provide concrete and understandable direction on what constitutes "good faith efforts" by employers, on remedies for an affected class, and on discrimination on the basis of sex.[84]

The 1976 House report again surfaced the overlapping problem of authority between EEOC and OFCCP which has continued to grow to the present:

> Federal employment activities are so fragmented and uncoordinated that a single employer may be forced to be discriminating under Title VII, yet in compliance with Executive Order 11246 . . . The confusion and contradiction is no less frustrating for complainants."
>
> While the proliferation of Equal Employment Enforcement Agencies could arguably afford greater protection through alternative remedies, in practice, the multiplicity of enforcement activities allows responsibility to be passed from one agency to another with little or no accountability. In addition, the fragmentation of Federal Equal Employment activities results in limited power and resources within the respective federal agency structures and little opportunity to impact on other agency activities.[85]

The House recommended, ". . . *guidelines and regulations of the Executive Order should be consistent with Title VII.*" [86] (emphasis added)

In testifying, Assistant Secretary for Employment Standards, Donold Elisburg, took a different position in his testimony before the House Committee in 1977, stating that:

> We have, of course, taken the view that the Supreme Court's recent decisions involving seniority of collective bargaining agreements do not apply to the Executive Order Program and the limitations to Title VII do not extend to the Executive Order Program.[87]

It is interesting to note that such a profound reversal from the position taken by the Committee on having the Executive Order conform to Title VII standards was not challenged by the Committee.

The 1976 House Staff report further pointed out:

> The agencies charged with enforcement of equal opportunity laws are frequently more concerned with compliance and with complex and burdensome procedures than with actual improvement and employment of minorities and women.[88]

The 1979 oversight hearings on EEO laws clearly reveal the struggle both Congress and recent administrations have had in overseeing

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[84] U.S. Congress, House Committee on Education and Labor, Subcommittee on Equal Opportunities, Staff Report on Oversight Investigation of Federal Enforcement of Equal Opportunity Laws, second session, 94th (1976) Congress, p. 66.

[85] Ibid. pp. 9, 10.

[86] Id. p. 20.

[87] Hearings on Federal Enforcement of Equal Employment Opportunity Laws before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Congress, 1st Session October 20, 1977, p. 33.

[88] Staff Report on Oversight Investigation on Federal Enforcement of Equal Employment Opportunity Laws, prepared for the Subcommittee on Equal Opportunities of the House Committee on Education and Labor (1976), p. 10.

the Executice Order program. This struggle, as first articulated by John L. Wilks, the Director of OFCC in 1970, centers around the need to identify appropriate criteria for measuring success in the Executive Order program.[89]

Both Congress and the Administration use interchangeable criterion. For example, Mr. Elisburg testified that the program . . . "was badly in need of improvement if it was to be a strong and viable mechanism for *insuring equal opportunity* (emphasis added)." [90]

He later goes on to say that:

> . . . we believe a better measure of our success is the extent to which we can get companies to agree on conciliation agreements that provide comprehensive relief to the victims of this employment discrimination.[90a]

From the testimony, one is led to conclude that the criteria used for achieving *equal opportunity* is the number of sanctions imposed on employers and the extent of relief provided to victims of discrimination. Mr. Elisburg's testimony on July 12, 1979, before the House Committee, reinforces this conclusion when he measures accomplishments by the number of debarments (8) the amount of backpay for minorities ($7.6 million) financial settlements ($5.7 million) and the number of administrative complaints. Their compliance efforts were focused ". . . on the identification of affected classes and securing of appropriate relief for those persons" [91]

From the congressional history it is evident that what started out as a program whose mandate was to pursue a national goal of improving employment opportunities for women and minorities, forty-one years later measures the achievement of that goal by the number of debarments of federal contractors, the identification of affected classes and the amount of backpay obtained for victims of discrimination. Such criteria used in measuring success of the program is comparable to measuring the success of the welfare program by the number of contacts a welfare worker makes and the number of fraud cases uncovered, rather than the number of families helped to get off welfare or to help them function to their fullest potential.

The record indicates that the success of the program has been measured by the amount of procedures and activities, rather than its results in achieving its mandated goal. Emphasis has been placed on enforcement procedures rather than the actual increase in the number of women and minorities in the federal contract workplace.

Needless to say, there are many reasons why the program has taken the direction it has at this time. It is important to note, however, that as Congress has held oversight hearings over the years, there has been a lack of oral testimony from actual federal contractors. Such a vacuum in the testimony denies Congress from valuable insights as to how the program has effected a significant party involved in the regulatory process and how to improve the program so it will achieve its intended

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[89] Hearings on Department of Labor and Health, Education, and Welfare Appropriations before a Subcommittee on Departments of Labor and Health, Education, and Welfare and Related Agencies of the House Committee on Appropriations, 91st Congress, 2d Session (1970), p. 531.

[90] Hearings on Federal Enforcement of Equal Employment Opportunity Laws, before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Congress, 1st Session, (1975), p. 25.

[90a] Id. (See footnote 87, p. 27.)

[91] Hearings on Federal Enforcement of EEO Laws, before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 96th Congress, 1st Session, (1979), p. 8.

objectives. For example, a quick review of hearings in the House covering six years, 1975 to 1981, reveals that of the 69 witnesses, only 8 were representing federal contractors (see following Table).

HOUSE HEARINGS WITNESSES [92]

[By Federal contractor/noncontractor]

Year	Number of days	Witnesses	
		Contractors	Others
1975	4	1	12
1976	1	1	5
1977	1	0	2
1978	2	0	2
1979	2	0	2
1981	6	6	46
Total	16	8	69

[92] Hearings before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, House of Representatives, 97th Congress, 1st session, (July 15; Sept. 23, 24; and Oct. 7, 1981). Hearings before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, House of Representatives, 96th Congress, 1st session, (July 12 and 30, 1979). Hearings before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, House of Representatives, 95th Congress, 1st session (Oct. 20, 1977). Staff report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws, prepared for the Subcommittee on Equal Opportunities of the Committee on Education and Labor, U.S. House of Representatives (December 1976). Hearing before the Subcommittee on Equal Opportunities of the Committee on Education and Labor, House of Representatives, 94th Congress, 2d session, (Nov. 10, 1976). Oversight hearings before the Subcommittee on Equal Opportunities of the Committee on Education and Labor, House of Representatives, 94th Congress, 1st session, (July 15, September 23, 24, October 7, 1981 Wash. D.C.; August 11, 1981, Chicago, Illinois; August 14, 1981, Los Angeles, California.).

SUMMARY

The history reveals that Congress has supported the intent for which the initial Executive Order was signed—to increase employment opportunities for women and minorities; that in spite of its initial efforts to keep the program doing more than that which it is required to assure non-discrimination, the program has now become preoccupied with finding discrimination, rather than creating new opportunities. The program is being measured by how effectively it carries out its procedures, rather than how well it gets the results for which it was created, i.e., the number of employment opportunities it has actually created for women and minorities.

It would be fruitful if Congress were to view the success of the program from a management stand-point, rather than simply an enforcement issue. For example, the ultimate goal is not how much enforcement but whether or not we are accomplishing the national goal for which we started and expected the program to achieve. How that goal is achieved may or may not be through the process or enforcement. The important thing is not to be wedded to the process and then measure success by how well that process is carried out.

Success should be measured by results in achieving the initial intent of the program.

III. FINDINGS FROM THE HEARINGS [93]

Five days of hearings and numerous letters and comments have provided a staggering array of opinions about the Office of Federal Contract Compliance Programs' enforcement of Executive Order 11246. The agency was praised, criticized and condemned; its staff was questioned and applauded. At times, the debate was heated and polemic but with reason. Representatives from the civil rights community view the program as a critical component of the federal government's commitment to end employment discrimination. They admit that its regulations have been expensive and poorly administered but that the program's success in terms of increasing minority and female employment opportunities has more than justified its shortcomings. Employers, on the other hand, are uniformly frustrated by the program's deficiencies and feel that the Executive Order's objectives are more likely to be achieved if the program is thoroughly revised.

Perhaps the most striking conclusion that can be drawn from the hearings is that the program is widely supported by both employers and minorities and women. Debate was rarely focused on whether there should be a federal contract compliance program; instead, attention was more often given to the success or failure of the existing regulatory framework and what could be done to improve or bolster its effectiveness. For the witnesses who testified, the value of or need for affirmative action was never in question. The only issue for them was whether OFCCP's regulations were the best means for implementing these concepts.

When viewed in its totality, the testimony addressed, in most part, nineteen separate, specific problems. These issues must be understood before one attempts to pass judgment on any proposals for changing either the program's regulatory structure or its methods, because their reconciliation or remedy is paramount to any successful revision of the program. These issues, which are analyzed in this report, are as follows:

1. Perceptions of the Executive Order Program and Its Achievements.
2. Agency Enforcement Techniques.
3. Paperwork Requirements.
4. Existing Targeting System for Selecting.
5. Compliance Standards.
6. Determining Availability.
7. Measurement of Underutilization.
8. The Formation of Job Groups.
9. The Monthly Manpower Utilization Reports.

[93] Oversight of the Activities of the Office of Federal Contract Compliance Programs of the Department of Labor Before the U.S. Senate Committee on Labor arnd Human Resources, 97th Congress, first session (1981). Part I (July 29, 30 and October 22, 1981 hearings on "*current effects*") and Part II (December 8, 10, 1981 hearings on "*solutions*").

10. Hiring and Promotion Goals.
11. Regulation of Academic Institutions.
12. The Evolution of the Program's Objectives.
13. The Monetary and Administrative Cost of Compliance.
14. Extent of Coverage.
15. Relationship Between the Responsibilities of OFCCP and those of EEOC.
16. Back Pay and Other Retrospective Remedies Pursued Under Executive Order 11246.
17. Legal Requirements Under E.O. 11246 Which Exceed Title VII.
18. Status of Bona Fide Seniority Systems.
19. Expedited Hearing Procedures.

A. Perceptions of the Executive Order Program and Its Achievements

Much of the difference in opinion over the value and success of the Executive Order program originates in the differing perceptions of the program that are held by those who either benefit from its regulations or must satisfy its requirements. For these distinguishable groups, the program's effectiveness varies depending upon the manner in which it directly affects them. For minorities and women, the program has helped to provide job opportunities that may otherwise not have been made available to them. Conversely, employers have become increasingly frustrated trying to comply with a program that is administered without concern for the consequences its requirements have on contractors and that it is based upon an assumption that all employers discriminate.

a. The Civil Rights Community

Civil rights leaders are rather uniform in their interpretation of the purpose of Executive Order 11246. It was designed to eliminate discriminatory barriers and to create a means for insuring the increased hiring of minorities and women throughout all levels of the American workforce.[94] Its justification seems to them so obvious that it tends to be overlooked in the discussion of how best to implement the Order. In presence, those who wish to discriminate should not be party to a government contract. As Althea Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People, stated:[95]

> We believe that if a person wants to discriminate, they should not discriminate using taxpayers' money. We believe that something must be done so that the fundamental right to compete equally for positions in the work force of Government contractors without regard to race, color, or non bona fide occupational qualifications must be protected at all times.
>
> The contractor's obligation to recruit, employ, and promote qualified members of a victimized class must be enforced regardless of the political climate, or regardless of the fact that it means additional reporting requirements.

Moreover, civil rights leaders repeatedly pointed to the success of the program, a success they were able to measure both in terms of gen-

[94] Hearing Record, July 29, 1981, at p. 62.
[95] Hearing Record, July 30, 1981, at p. 313.

eral statistics and in terms of the impact the program has had on individuals. For example, Wider Opportunities for Women submitted testimony indicating the impact the program has had on the number of women applying for mining jobs at Peabody Coal Company. It noted that according to the company's own affidavits, the applicant flow for women was as follows: [96]

In 1972, no women applied for mining jobs at Peabody in Kentucky;

In 1973, 15 women applied for mining jobs at Peabody in Kentucky;

In 1974, 94 women applied for mining jobs at Peabody in Kentucky;

In 1975, 291 women applied for mining jobs at Peabody in Kentucky;

In 1976, 297 women applied for mining jobs at Peabody in Kentucky;

In 1977, 720 women applied for mining jobs at Peabody in Kentucky;

In 1978, 1,131 women applied for mining jobs at Peabody in Kentucky.

In a similar vein, Susan Brophy, the current Chair of Women for Blue Collar Jobs, offered the following more personalized story: [97]

I would like to invite you up to Everett, Mass. to meet Joan. Only 28 years old, she is an ex-alcoholic, has three children, and is the sole wage earner in her family.

When I met her she had been on welfare for years but had a burning determination to get off the roles. Now she is a cement mason apprentice with local 534, making $6.28 an hour and she is proud to be off welfare.

I would also like others on this committee to meet Barbara. Believe me she would have a few things to say. She would talk about 2 years ago when she was on welfare with two kids and a sick mother to support. She would talk about how her ex-husband tried to have her declared an unfit mother because she wanted to be a construction worker. Then she would talk about $10.22 an hour she is now making as a laborer and about the improvements she has made in her home and family life now that she has a skill and a job.

Finally, I would like to bring Paula down to Washington to meet with some of my colleagues in the construction industry. She would tell the story of her previous drug habit and how her children were taken away by court order. She would then talk about the $6.20 an hour she is making as an electrical apprentice and how her children have been returned to her. In short, she would talk about her new life.

These very real accounts provide rather direct evidence of the impact that the program is having. Consequently, it is easy to understand why for these civil rights leaders and others, to question the federal contract compliance program is really to question whether there should be affirmative action. From their perspective, any change in the existing regulations may affect the potency of the current requirements which ultimately may mean fewer jobs for minorities and women.

Moreover, the civil rights community is rather uniform in what it sees as the major failing of OFCCP. Voicing a common complaint, Carol Grossman, national president of the Women's Equity Action League, note; [98]

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[96] Hearing Record, October 22, at p. 581.
[97] Id. at p. 474.
[98] Hearing Record, July 30, 1981, at p. 243.

Testimony before this committee has charged that OFCCP's failure is a result of bureaucratic overkill, particularly extensive reporting requirements, and a rigid confrontational posture in dealing with Federal contractors. We could not disagree more.

None of these criticisms accurately pinpoint the most important problems associated with OFCCP's compliance efforts. The failure of the OFCCP to effectively enforce the executive order program is a result of a lack of commitment on the part of any administration to full implementation of the program. The chief limitations which remain to be addressed by OFCCP are insufficient personnel with inadequate training and experience in the academic sector investigation and the absence of a workable management information system.

Arnold S. Torres, National Executive Director, League of United Latin American Citizens, echoed this assessment and broadened it somewhat when he stated,[99]

We contend . . . that the reason why the progress has not been as great as we would like is because of a lack of leadership. The leadership primarily can be pointed to in the area of where are the people who control the powers of opening up more opportunities.

b. Contractors

For those employers who are federal contractors, their perception of the program is somewhat different because of the cost they must bear to make equal employment opportunity a reality. It is important to note, however, that the contracting community's interpretation of the purpose of Executive Order 11246 is similar to that voiced by the civil rights community. As Robert A. Beck, Chairman of the Prudential Insurance Company, stated:[100]

We believe the purpose of affirmative action is to make something happen. It means more than "business as usual." It is evidenced by positive efforts to insure equality of treatment or to assist and encourage minorities and women in taking advantage of job opportunities.

The Equal Employment Advisory Council expanded upon this statement and explained its interpretation of OFCCP's role.[101]

OFCCP's current program is based on the conviction that more was needed to remedy societal and employment discrimination than simply the assurance of neutrality in personnel decisions. Policies which prohibit discrimination against equally qualified candidates tend to benefit only those minorities and women who already are qualified for and interested in the positions sought. For the many minority and female candidates who are interested but unqualified due to economic or educational disadvantage, affirmative steps have been needed to make them both qualified and aware of their rights and opportunities. Thus, OFCCP was charged with ensuring that all federal contractors and subcontractors not only refrain from discriminating against individuals or classes, but also take affirmative action to ensure the equality of employment opportunities.

Contractors contend that the purpose of the Executive Order is not being furthered as effectively as it could be if the existing regulatory structure was improved. James J. Graham, testifying on behalf of the Business Roundtable, argued:[102]

. . . many aspects of OFCCP's existing regulations are counterproductive and a serious hindrance in stimulating Federal contractors' efforts to achieve meaningful affirmative action results for minorities and women.

The essential message in these comments is that the program should be reoriented. so that OFCCP's effectiveness is ultimately demonstrated by increased

[99] Hearing Record, October 22, 1981, at p. 453.
[100] Hearing Record, July 29, 1981, at p. 35.
[101] See prepared statement by Equal Employment Advisory Counsel (EEAC) Dec. 10, 1981.
[102] Testimony of James J. Graham, Dec. 10, 1981.

numbers of minorities and women hired, trained, and promoted as a result of contractors' good faith efforts rather than by penalties demanded and contractors debarred. This will require a change in OFCCP's current concepts and operation approach.

Moreover, several contractors feel that the existing program has ignored the one critical factor necessary to achieve the equality of opportunity-training. For example, Mr. Beck testified: [103]

The existing program fails to address the fundamental issue of how to increase effectively the supply of minorities and women with the necessary skills to fill existing job opportunities.

The contractors who testified never questioned the positive impact that the program has had on their own work forces or the labor force in general.[104] What they did question, given the annual administrative cost of the program (estimated to be more than $1 billion), was whether there was a more effective means to accomplish the objectives of Executive Order 11246.

c. Commonality of Perspective

The hearings indicated, however, that once the rhetoric is set aside, both employers and the civil rights community share many of the same concerns and hopes. Jose Cano, National Chairman of the American GI Forum, concurred with the many employers when he stated: [105]

The current program emphasizes compliance procedures which serve mainly to lock firms into an entangling bureaucratic reporting process . . . the process builds in employer opposition to the program.

And James I. Nixon, Vice President of ITT, echoed many civil rights leaders when he stated: [106]

The broad effort which we have been referring to here as our Nation's affirmative action program should be, I think, the embodiment of our basic principles of equality of opportunity in employment and our collective commitment to taking those steps necessary to assure the translation of principle into practice as it affects all citizens. I think that that is the thing that most of the speakers preceding me have basically been saying. It is certainly my position.

Thus, there is a continuing need for the program both as a powerful symbol of a national principle, but also as a potentially effective mechanism for integrating the efforts of a large sector of our economy, the Government contractors, toward attainment of the goal of translating that principle into day-to-day practice.

In fact, Maria Rouco, Director of the Cuban National Planning Council provided perhaps the most cogent and insightful analysis of the hearings when she concluded: [107]

Basically, therefore, it appears that the reforms needed are not of a philosophical nature, that is, changes in the essence of Executive Order 11246, which was justly created to eliminate discriminatory barriers and to increase the opportunities for minorities and women in the Federal contract workplace. What must be changed are the regulations which control enforcement. However, it is imperative that in streamlining reports, reducing paperwork, and in improving com pliance tactics, that changes or regulations that are implemented do in no way lessen or impede the attainment of the initial objectives of this Executive order.

[103] Hearing Record, July 29, 1981, at p. 35.
[104] See, e.g., the Dow Chemical Company's rather remarkable record, Hearing Record, July 30, 1981, at p. 279 and following.
[105] Hearing Record, July 29, 1981, at p. 62.
[106] Hearing Record, July 30, 1981, at p. 331.
[107] Testimony, Mario Rouce, December 8, 1981.

B. OFCCP's Regulations and Their Administration

There seemed to be a general consensus among the witnesses that many of OFCCP's regulations and the regulatory methods used to implement them need reconsideration. The agency was described as suffering from almost all the ills that can be attributed to a federal bureaucracy and, most surprisingly, often seemed its own most telling critic. One OFCCP supervisor submitted the following letter to the Committee: [108]

> Dear Senator Hatch: I am currently employed as a supervisory equal opportunity specialist employment in the [blank] area office of the Office of Federal Contract Compliance Programs. I probably have as much or more direct field level experience in equal employment opportunity as anyone in current Federal agencies. For the past several years, I have been engaged in a running battle with management of these agencies regarding numerous problems I have seen: One, layer upon layer of unnecessary levels of review; two, paperwork burdens; three, Government "highhandedness;" four, lack of commonsense and reliance upon form over substance; five, wasteful operation; six, generally poor management techniques and mismanagement of resources.

The need for reconsideration becomes most evident when one reviews the key regulations on an individual basis. As the following analysis indicates quite clearly, there is serious doubt as to whether OFCCP's existing regulatory structure is the best mechanism for achieving the objectives of Executive Order 11246.

1. Agency Enforcement Techniques

It is widely assumed that complaints about OFCCPs enforcement techniques are simply the consequences of agency officials performing their duties. As Carol Burroughs Grossman noted in her statement: [109]

> Testimony before this committee has charged that OFCCP's failure is a result of bureaucratic overkill, particularly extensive reporting requirements, and a rigid confrontational posture in dealing with Federal contractors. We could not disagree more.

She went on to state that the primary reason for OFCCP's problems were a lack of commitment by the Federal Government to enforce the program. She went on to say at a later date,[110]

> It is our experience that most ardent complaints about costs, paperwork, and procedures, when examined in depth, are usually found to arise from more fundamental disagreements with the purpose of the Executive order and the mission of the agency.

There was significant testimony, however, to the contrary. For example, in 1979 OFCCP began an investigation of the Prudential Insurance Company, even though the company and the agency had signed a consent decree in 1976 covering all issues concerning affirmative action. The agency's initial demand required a submission by the company of 7,500 pages of personnel information, but only three days after this demand was met, OFCCP told the company it wanted all computer tapes containing personnel data, some 2,600 reels of com-

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[108] Hearing Record, July 30, 1981, p. 257.
[109] Hearing Record, July 30, 1981 at p. 243.
[110] Testimony, Carol Burroughs Grossman, December 10, 1981.

puterized information.[111] The company suggested that since much of the tapes was personal (e.g. spouse name, charitable deductions) and was not germane to the investigation, it could provide OFCCP with a sanitized version of the material. OFCCP refused, and two years later a Federal district court had to resolve the issue by preserving the privacy rights of the company's employees.[112]

At no time during the investigation was Prudential ever accused of discriminating. At no time during the investigation was a charge of discrimination filed against Prudential, yet the company was forced to spend $1.5 million to demonstrate its innocence. Moreover, not a single minority or woman was hired or promoted because of the review. In fact according to the Chairman and Chief Executive Officer of Prudential, Robert A. Beck, the sole purpose of the review was bureaucratic infighting—OFCCP's concern for headlines because of its fear that without public recognition, it would be merged into the EEOC.[113]

There is a tendency to presume that problems such as those experienced by the Prudential Insurance Company are rare, and such complaints are usually voiced by large employers who have easy access to the media or to the government. For example, Arnoldo Torres asserted that OFCCP has generated complaints about its techniques because "it has been involved with some of your big employers who have a great deal of access to complain about that process.[114]

Unfortunately, it is not always the big contractors that are reviewed, and OFCCP literally hounded one small employer out of business. Alma Gaghen Plumbing Company. She stated that she was so harassed by OFCCP officials that she was forced to sell the business she and her husband had founded. During one compliance review, she was informed she was discriminating against women because she had failed to reach the hiring goal that the agency had set for female construction. The agency was unconcerned with the fact that she employs only five individuals,[115] that her one female employee had quit[116] and later, ordered Mrs. Gaghen to fire a white employee so she could hire another minority and improve her employment statistics.[117] She was courageous enough to refuse but finally was so distressed that she sold her business rather than continue to try and accommodate the unfounded and illegal demand of OFCCP.[118]

This was no success for affirmative action or for women rights. OFCCP's tactics had succeeded in running out of business probably the only female, minority, handicapped owner of a plumbing business in the United States.[119]

Many of the problems evidenced above stem from the attitudes of the government employees who enforce OFCCP's requirements. The hearings were filled with accounts of agency officials who were un-

[111] Hearing Record, July 29, 1981, p. 31. It was never made clear whether OFCCP actually had the computer capabilities to process the data if the company had turned it over.
[112] Hearing Record, July 29, 1981, p. 32.
[113] Id. at p. 37.
[114] Hearing Record, October 22, 1981, p. 473
[115] Hearing Record, July 29, 1981, at p. 73.
[116] Id. at p. 76.
[117] Id. at p. 73.
[118] Id. at p. 75.
[119] Id. at p. 71.

professional, uncooperative and belligerent, seemingly pre-occupied with their own presumptions about contractors instead of with the facts before them.[120] One witness, Carol Grossman, disagreed with these allegations, claiming: [121]

> As to the problem of excessive confrontation by investigators, I have but one comment. My experience is that the tone of the investigation is as likely to be set by the receiving institution as it is by the agency. Every horror story of inappropriate behavior by and investigative team can be matched by one describing equally bad behaviors by a contractor.

Again, there was significant evidence to the contrary. One witness, Frank Salatto, learned the hard way what OFCCP does to contractors who question agency demands. He testified: [122]

> At one meeting it was requested that we submit a report, and I suggested to the EOS [Employment Opportunity Specialist] that the report he was requesting was just time-consuming with excess hours and paperwork and that if we did it in another manner we could do it faster and give him the results he wanted. In front of about 12 people he said, "What is your name? Whom do you work for? Where is your office? I am coming to your office, and if you do not have a minority in your office staff I will cite you." I was kind of astonished, and I did not know what to do. It never occurred to me that a government employee could or would act in this manner, but the fact is that he did take this tact in front of 12 other contractors.

Naturally, Mr. Salatto was subsequently subjected to an arduous compliance review by OFCCP. Another witness, Stephen C. Glenn of Bank of the West, had a similar experience and his testimony provides a shocking insight into the methods used by OFCCP: [123]

> I received a phone call from Mr. Córdova [an OFCCP Official] on May 18, 1981, who indicated that he was surprised that the bank would not sign the conciliation agreement. He questioned why we wanted to challenge their procedures. He said he would not accept a letter of commitment and would move to enforcement. He indicated that if the bank did not sign the conciliation agreement it could cost us another $74,000 and stretch out another 1½ years possibly 3 years. He stated he was having his staff reanalyze our data to "make sure they had not overlooked any problems." He said they would do a "thorough offsite analysis" to attempt to detect "additional deficiencies in the bank's AAP." He also noted this would not be necessary if we signed the conciliation agreement. He compared our review to the Firestone case, one he had initiated in Texas. He said that while OFCCP had lost the case he personally viewed it as a victory as it helped clarify the rules. He also noted that it took several years and cost a great deal of money. He then requested a meeting with McKenzie Moss, the bank's president, to make certain he understood the implications of not signing the conciliation agreement. On May 26, 1981, a meeting was held at the bank with Messrs. Moss, Cordova, Oroz, Luevano, Cronin, and myself. Mr. Cordova reviewed the case and consequences of not signing the conciliation agreement. Mr. Moss noted that his presentation appeared to be a threat, and the discussion became somewhat heated. During the discussion, when asked about some specifics in the bank's letter of commitment, Mr. Cordova said that he had not personally read it—it was addressed to him—and that it was still being processed by his staff. He also said that he had not personally reviewed the bank's AAP.

Fortunately, Mr. Cordova's bullying was unsuccessful, but it cost the bank more than $83,000 to defend itself. Again, no charge of discrimination was ever filed against the bank, nor was it accused of discriminating by the agency. Moreover, the bank's basic affirmative

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[120] Hearing witnesses, Arthur Hansen, Carol Burroughs Grossman, Estelle Fishbein, James Nixon, Juan Trujillo, July 30, 1981; Ronald Green, David Copus, December 8, 1981; Robert Thompson, John Priest, Robert Bauman, John Bridge, December 10, 1981.

[121] Hearing Record, July 30, 1981, at p. 245.

[122] Hearing Record, July 29, 1981, at p. 69.

[123] Hearing Record, July 24, 1981, p. 102.

action efforts have remained unchanged, and no additional employment opportunities were created by OFCCP's activities.[124] OFCCP simply wasted $83,000, money that could have been spent on constructive efforts.

Only the most cynical can claim that these agency officials furthered the objectives of Executive Order 11246. A more accurate assessment is that these actions better serve those who wish to remove any vestige of affirmative action from our society than those who are committed to the equality of opportunity.

2. PAPERWORK REQUIREMENTS

There was a general consensus among some civil rights group representatives and most employees that many of OFCCP's requirements are wasteful, burdensome and unnecessary. Jose Cano described the program as an "entangling bureaucratic reporting process." [125] Carmen Estrada, appearing on behalf of the Mexican American Legal Defense Fund, expressed a similar view when she stated: [126]

> Any serious attempt to improve the Federal role in increasing employment opportunities for women and minorities must address the major problems identified in previous hearings head-on, and those are the problems of duplicative investigation and inconsistent investigation procedures creating major paperwork burdens, being costly to employers and the Federal Government, as well as inconsistent and confusing interpretation of standards and regulations.

Several civil rights leaders felt, however, that such complaints were inaccurate. Althea Simmons expressed her problems with the "continued complaints regarding too much paperwork by those who would feed at the federal trough." [127] Day Piercy, Executive Director of Women Employed, dismissed accusations that the program was too burdensome and, thus, ineffective. Progress has been slow because the program has only just begun to function.[128]

Nonetheless, problems with the agency's burdensome regulations are more substantial than simply the disgruntled grumblings of a few, recalcitrant employers. For example, one contractor was ordered by OFCCP to furnish copies of the employment files of 350 employees, all of whom had been with the company for several years. The company notified the agency that the requested data, if accumulated, would involve over 10,500 pages and suggested that to save the duplication and processing cost, agency officials could visit the facility and review the original files on-site. The agency responded that it did not have a sufficient budget to make such visits and that if it did not receive copies of the files, the contractor would lose its federal contracts. The agency never acknowledged that the one compliance officer assigned to the case never would have sufficient time to review and analyze the data before it would need updating.[129]

The testimony from officers of the National Bank of Greenwood was even more distressing.[130]

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[124] Hearing record, July 29, 1981, p. 103.
[125] Hearing record, July 29, 1981, at p. 62.
[126] Witness, Carmen Estrada, December 10, 1981.
[127] Hearing record, July 20, 1981, at p. 313.
[128] Witness, Day Piercy,December 10, 1981.
[129] Statement, EEAC, December 10, 1981.
[130] Hearing record, July 29, 1981, p. 107, 108.

We are amazed at the ever changing demands of that agency for statistical data, general format, job groups, language, recruitment areas, the eight-factor analysis. For 2½ years it has been like a river, always moving, always shifting, always changing; it never stays the same.

In our last meeting with OFCCP on July 7 of this year once again we were told to change job groups. We had reached agreement on this matter last year. Three employees were shifted—just three—affecting five job groups: the work force analysis, the utilization analysis, and finally the goals and timetables. Incredibly, 3 days later the specialist who requested that change in turn questioned our resulting statistics. In 3 days she had forgotten that she had requested the change.

. . . We have alluded to the cost and volume of paperwork required and now need to focus on the time frames. As an example, in the letter from OFCCP dated November 21, 1980, additional information was requested concerning previous and current employee histories as far back as 1945. I was given 2 weeks to reply to that letter, and when I did reply the material was 11 inches thick—and I had 2 weeks. Bear in mind that it is just myself and my secretary. We did not get a reply from them in turn until April 6, 1981—4 months later. Similar examples abound.

3. EXISTING TARGETING SYSTEM FOR SELECTING CONTRACTORS FOR REVIEW

Several witnesses were concerned that the agency has never developed an effective mechanism for targeting contractors for review, a seeming necessity for any federal agency where the regulated far outnumber the regulators. OFCCP claims that today contractors are selected for review based upon their size, the number of job opportunities involved, or the filing of complaints of discrimination against specific contractors. During the Carter Administration, however, contractors were often selected because they were in a targeted industry, i.e., an industry that OFCCP had chosen to review either because of heavy female or minority employment or for political reasons. Apparently, OFCCP does not take into consideration the number of reviews a contractor has undergone previously or its actual record of affirmative action efforts when selecting companies to review. Moreover, OFCCP does not make its selections for review by comparing one contractor's record of affirmative action to another enabling it to review the worst contracts first. Although OFCCP developed such a targeting system, it has never chosen to use it.

The hearings revealed that this unstructured method of selection has had the expected, uneven impact. John W. Smithwick, Senior Vice President of First American Bank of Nashville testified: [131]

Why our organization was selected for review we do not know. To the best of my knowledge, this notice of an intent to audit did not result from any individual or class complaint for no alleged violation had been filed with this agency. We assume that the bank received its notification as a result of the agency's decision to target the banking industry under what we believe to be the widely publicized assumption of industry wide guilt.

* * * * * * *

. . . it was interesting that about a year into our [compliance review] one of our EOS's stated to us that if they had known we were not the largest bank in Tennessee we probably would not have been audited at this time.

Other testimony received during the hearings indicated that one contractor with 113 facilities underwent 135 compliance reviews in one year. In other words, twenty-two facilities underwent two reviews in only one year. Another contractor had a facility which was es-

[131] Hearing record, July 29, 1981, p. 110, 111.

pecially attractive to OFCCP. It has been reviewed every year for the last seven consecutive years.[132]

The Dow Chemical Company underwent five compliance reviews during a three year period, which is not a necessarily high figure unless one is familiar with the company's affirmative action record. Since 1966, Dow has hired only 411 nonminorities while, at the same time, it has hired 4,575 minority individuals. The company's hiring rate for minorities has been eleven times that for nonminorities.[133] Oddly even this extreme record was not sufficient evidence for OFCCP of whether the company was engaged in affirmative action.

4. COMPLIANCE STANDARDS

Many of the difficulties with the Executive Order program which were cited by the witnesses stem from the standards used by OFCCP to measure compliance. Perhaps the most frequent complaint about these standards are that they are enfroced too rigidly, that they are too inflexible to accommodate all of the vagaries in the workforces of federal contractors. One witness, however, discounted such criticism. Carol Grossman commented that employers were schizophrenic when it came to compliance standards:[134]

> I will not say that investigative teams are identical in the way they treat these numerical indicators, but I have had conversations with representatives from industry who revealed a rather schizophrenic attitude toward quantitative measures of compliance. On one hand, they decried what they saw as the complexity and rigidity of the standard utilization analysis. On the other hand, they would suggest a quick and simple one-step equation by which to determine compliance, a solution which would inherently resist being tailored to individual institutional needs and circumstances.
>
> Employers seem to want certainty and flexibility. I think that is impossible to achieve. Many of those who have testified before us have also complained about inconsistency by the agency in the application of policy and communications with industry. We, too, have complained of such waffling and indecisiveness, usually because complainants are left hanging for long periods of time with no word on the resolution of their case.

As the testimony found in the following four subsections indicates, however, the problems associated with the agency's compliance standards may be more significant than Ms. Grossman claims. She states that the written affirmative action programs, which contain all of the factors to be measured, are the "cornerstone of the program."[135] The testimony from others would agree with this assessment. What they also contend, however, is that the measurement process itself needs to be more flexible because the factors being measured are so inherently imprecise.

Of the hundreds of regulations concerning written affirmative action programs, those governing availability, underutilization, job groups and the monthly manpower utilization reports were commented upon most frequently and justify special attention. When viewed together, they represent most of the critical issues which currently confront the Executive Order program.

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[132] Statement, EEAC, December 10, 1981.
[133] Hearing record, July 30, 1981, p. 281.
[134] Hearing record, July 30, 1981, at p. 245.
[135] Id. at p. 42.

a. Determining availability

Determining "availability" is perhaps the single most important and clearly the most contested component of OFCCP's regulations concerning affirmative action planning. Difficulties with the concept stem from confusion over its definition and the regulations' bewildering requirements for its formulation. As noted by the Equal Employment Advisory Council in its statement: [136]

> As defined by OFCCP, availability is the number of minorities and women who have the necessary skills required for entry into a job group, or who are capable of acquiring them. Contractors normally define availability in terms of those who possess the necessary skills and interest to fill an opening. The two definitions are antipodal; one focuses on current skill possession, while the other is based on a person's capabilities, an extremely difficult feature to measure. This definitional difference is critical because of the ways in which availability is used. It serves, first, as the standard against which a contractor's current minority and female representation is measured and, second, as a basis for setting goals. If availability is defined in terms of all those who may become capable of performing a job, it has little relevancy as a measure of whether a contractor is currently hiring already qualified minorities and women in a non-discriminatory fashion. OFCCP contends that its inflated definition is necessary to correct the historical discrimination reflected in the current distribution of skills within the labor force. As a result, availability often represents a negotiated compromise between the contractor's estimate of the number of minorities and women actually qualified for a job and the government and women who would be available absent discrimination.

This confusion over the definition of availability is exacerbated by OFCCP's regulations governing its formulation. The agency requires that eight factors must be considered when determining availability, few of which are exclusive of the others or are readily definable.[137] Consequently, availability determinations are often very susceptible to manipulation. As one witness testified: [138]

> The regulations, as you know, call for an analysis of eight factors for minorities and females but do not mention a weight factoring system. One percent is to be spread among the eight factors with a maximum weight—this was the weight we were directed to use—of 0.225 assigned to any one factor. We diligently analyzed the factors, used the weights as directed, but could never satisfy the Agency. In utter frustration we agreed to use two factors of the Indianapolis SMSA to speed the acceptance of our program. Still the Agency refused to accept our final availability analysis. Eventually the OFCCP did the analysis for us. That was the first technical assistance we really had, but it was on a take-it-or-leave-it basis. They used weights as high as 0.95. We were directed never to do anything of that nature. Again we followed instructions only to find them changed at the will of the OFCCP. The final result of indiscriminate and arbitrary use of the weighting system skews or bloats the availability figures provided by the official census data.

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[136] Statement, EEAC, December 10, 1981.

[137] As listed at 41 C.F.R. §§ 60–2.11(b)(1) and (2), the factors are:

(i) The minority population of the labor area surrounding the facility; for women, this factor is the availability of women seeking employment in the labor or recruitment area of the contractor;

(ii) The size of the minority (or) female unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority (or female) workforce as compared of the total workforce in the immediate labor area;

(iv) The general availability of minorities (or women) having requisite skills in the immediate labor area;

(v) The availability of minorities (or women) having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities (or women) within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities (or women).

[138] Hearing record, July 20, 1981, p. 107.

Statistical weighting then can put a contractor in a deficiency utilization posture, which may ont be the case at all.

The factors also are of questionable value because they fail to measure one of the most critical elements affecting whether an individual is actually available for a job—interest. In her comments Estelle Fishbein, General Counsel of John Hopkins University, referred to the problems confronting higher education but her concerns reflect a common theme voiced by many employers: [139]

[a]vailability is a fiction which ignores the realities of life in a free society and the unique needs of academic institutions. It assumes that every qualified person is perpetually seeking a job, disregarding the fact that at any given time many employees do not wish to change employers. This is particularly true in academic employment where tenure and the prestige of a particular institution are factors which tend to increase longevity in employment.

Then, too, OFCCP prefers to pretend that everybody earning a college degree from a bachelor degree to a doctorate is somehow available to teach and do research in a college or university. We have had trouble convincing them that a Ph.D. is an appropriate requirement for faculty employment at Johns Hopkins. Another common error is that the OFCCP personnel do not appreciate that there is a high degree of specialization within each academic discipline, and that for valid educational reasons, an academic department must have a variety of expertise represented within its faculty.

* * * * * * *

In truth, there are not and never can be accurate availability statistics in a free society. The assumptions which OFCCP has attached to availability statistics are warranted only in a totalitarian state where Government can assign people to work where the Government decides they should work.

Concern over the regulations governing the determination of availability also was raised by Jose Cano. He seemed to articulate succinctly the most frequently cited problem that arises when OFCCP has tried to use general labor force statistics as the availability standard for skilled positions. He stated: [140]

I heard it mentioned awhile ago that the labor statistics that are currently being used as a measure of a goal become a quota. I think that is unrealistic because what is available in the labor market is not necessarily the skill that might be available.

* * * * * * *

In the Hispanic community we have about 3 percent of our graduates of universities coming out who are engineers, yet the labor force statistics for Hispanics is something like 14 or 15 percent. It is unrealistic to have 15 percent while there is only 3 percent availability so it is an unrealistic type of approach.

b. Measurement of Underutilization

The problems with availability are compounded by its required use in what is called the utilization analysis, which contractors are required to include in their affirmative action programs. It compares the percentage of minorities or women in a group of the contractor's jobs with their "availability" for those jobs, as determined by a consideration of the eight factors. According to OFCCP's regulations, a contractor is underutilized in a job group if there are fewer minorities or women in that job group "than would reasonably be expected by their availability." [141]

Unfortunately, OFCCP interprets this regulation to mean that any numerical difference between the actual representation of minorities

[139] Hearing record, July 30, 1981, p. 261, 262.
[140] Hearing record, July 29, 1981, at p. 67.
[141] 41 C.F.R. § 69–2.11(b).

or women and their respective availability requires the contractor to set a goal and timetable for that job group, even if the difference includes a fraction of a person. Such a rigid requirement is founded on the false presumption that availability determinations are accurate standards when OFCCP's own regulations demonstrate that they are at best imprecise, subjective estimations.

This very issue was raised in *Firestone Synthetic Rubber & Latex Co.* v. *Marshall*, ____F. Supp. ____, 24 FEP Cases 1699 (E.D. Tex. 1981). There, the contractor argued that underutilization need not be declared unless the disparity between incumbency and availability is greater than would be expected by applying a 5 percent statistical significance test. The Department of Labor disagreed and contended that a "direct comparison of incumbency to availability is the only method cognizable under the regulations of § 60–2.11(b)." The court concluded that DOL's interpretation was inconsistent with the regulations because (1) the "reasonably be expected" standard is subjective while DOL's test is objective, and (2) the regulations require that all eight factors in § 60–2.11(b) of the regulations be considered in determining the need to declare underutilization, only one of which is an estimation of availability.

c. The Formation of Job Groups

For contractors, an equally difficult component of the required affirmative action program concerns job groups. Contractors are required to divide all the jobs in their workforces into groups based on content, wage and opportunity similarity. These job groups serve as the first half of the comparison (availability being the second) used to determine whether a contractor is underutilized and goals are required. Unfortunately, as enforced, this segmentation is often too small or fails to reflect a contractor's organizational and occupational structure, especially if that structure is unique.[142]

As the following testimony from Bank of the West indicates, OFCCP has used the subjectivity of components such as job groups to force contractors into a "Catch 22" position:[143]

> The meeting focused on the bank's job groupings. The bank pointed out that the definition of job groups in the regulations was in parentheses and that it required that groups of similar content, compensation, and opportunity be grouped together. We argued, to no avail, that our present grouping met this test. We also cited several banks and savings and loans that this region had recently reviewed and approved with the same job groupings as Bank of the West.
>
> * * * * * * *
>
> We noted that the OFCCP had approved this format in the widely published Chase Manhattan conciliation agreement. We provided copies of the proposed regulations for the banking industry that the OFCCP had published at the time our bank developed its AAP calling for the same format we provided.
>
> We also provided a copy of the agency's policy issuance ARA 78–17/60–1 directed specifically at contractors with previously approved automated reporting formats. We were advised that all of these facts were not relevant to our case.
>
> We were later told by Mr. Luevano [an OFCCP official] on April 30, 1981, that at this time the region had 29 other approved plans with our salary grade based types of job groupings. We asked OFCCP if we changed our format and reprogrammed the computer would it be acceptable for our next review. We were

[142] Witness, David Copus, December 8, 1981.
[143] Hearing record, July 29, 1981, p. 100–101.

told by Mr. Southard that if we changed our job groups this time there could be no assurance that they would be approved in future reviews.

Mr. Chen [an OFCCP official] reviewed our utilization analysis and commented that with 900 people the bank showed a very small number of underutilization job groups; therefore, if we were in that much compliance, our job groupings must be inappropriate.

The foregoing example is not, unfortunately, atypical of OFCCP's use of his own standards. It would appear that OFCCP did not commence this compliance review with an open mind, hoping to ascertain whether the employer was abiding by its Executive Order obligations. The agency apparently entered the review intending to uncover statistical evidence of discrimination, even if it had to twist and manipulate its own oblique regulatory requirements to a point of absurdity.

d. The Monthly Manpower Utilization Reports

According to construction contractors, one of the most burdensome requirements is the monthly manpower utilization report, Form CC–257. These reports provide a summary of each construction contractor's work force for the month, indicating the number of minorities and women in each craft on every job site and the hours worked by these groups. Consequently, for construction contractors, the report provides the numerical data by which compliance is often determined.

The problems caused by this report are primarily attributable to OFCCP administrative incapabilities. First, there is the agency's confusion over processing the report. According to one witness.[144]

Neither OFCCP's regulations, nor its Compliance Manual, even refers to the CC–257 which construction contractors must file each month. An AGC [Association of General Contractors] survey of federal and federally assisted construction contracts, for different parts of the nation, revealed that even these contracts do not refer to the CC–257. As a result, construction contractors must rely on some kind of informal notification of one of their most fundamental obligations.

In November of 1980, after receiving numerous letters and calls, and concluding that confusion surrounded the CC–257, AGC sent letters to OFCCP's ten regional offices and to the agency's national office. In the letters, AGC asked only basic questions, such as where construction contractors should file their reports, and whether OFCCP intended the reports to cover laborers. The various offices required five months to reply.

When they did reply, the offices revealed that OFCCP was itself as confused as the construction contractors. Boston, Kansas City and Denver would only refer AGC to the national office. San Francisco stated that it could not yet answer the questions, but that it would do so "as soon as possible." Atlanta, Dallas, Philadelphia, Seattle and the national office advised AGC that contractors should submit their reports directly to the relevant area office. However, Chicago and New York simply referred AGC to the CC–257 for an answer. The form states only that "[t]he prime contractor shall submit a report . . . to the Federal compliance agency that has Executive Order 11246 responsibility." The national office advised AGC that each general contractor and each subcontractor should independently submit its own report. However, Dallas, Philadelphia and Seattle advised AGC that general contractors should collect the reports from their subcontractors, and then submit the reports on the latter's behalf. Chicago and New York again referred AGC to the CC–257, which also advises that general contractors should collect the reports from their subcontractors, and then submit the reports on the latter's behalf. Atlanta's reply was ambiguous. Finally, Dallas, Philadelphia, Seattle and the national office advised AGC that the agency intended the reports to cover laborers. However, Atlanta replied: "Inasmuch as laborers *is* [sic] not considered a construction skilled craft, no reporting requirement exists for female and minority utilization of laborers."

[144] Hearing Record July 29, p. 493.

Second, OFCCP has used these reports in an extremely arbitrary fashion, failing to acknowledge that simplistic numerical tests often fail to account for the daily dynamics of a workforce. As Mr. Salatto noted in his testimony:[145]

> We were then instructed on submitting a monthly manpower utilization report which gives the OFCCP a picture of your EEO posture. When they review this they do not look at the number of individuals one has on one's payroll; they look at the hours.
>
> If for some reason an individual—either because they are sick or on vacation—does not work in that month and the hours numbers do not reach these goals, then you are flagged for audit. If they do not reach them within a given period of, say, 3 months, you definitely will be audited.

This failure on the part of OFCCP to look beyond the numbers can have dramatic consequences for contractors, as Ms. Gaghan demonstrates in the following testimony. It is important to remember when reading this excerpt that her entire workforce consisted of five individuals.[146]

> In April 1979 we were audited by the OFCCP and I was shocked and amazed to find that we were charged with 13 violations. One of the deficiencies cited was our failure to meet the goals of 25-percent minority employment.
>
> During the month of February 1979 our reported minority employment dropped to 18 percent of the hours worked on the job site. The one minority we had was married in February 1979 and elected to take 7 days off to go on his honeymoon.
>
> These 7 days represented 56 working hours on the job site. Had the minority been on the job site, that percentage would have increased to 26.6 percent.
>
> We were audited for an 8-month period from July 1978 through February 1979, and not once did the equal opportunity specialist from the OFCCP ever consider that our average total for minority employment was 29.38 percent.
>
> I had asked the specialist at that time why allowances were not made for these 56 hours that our minority employee had taken off, and he told me that I would have had to hire another minority to replace the one who was on his honeymoon.
>
> But this led to other problems simply because when our minority employee returned from his honeymoon we could not let the new minority go and neither could we let our other minority go. And this was what I was told: to let another nonminority, employee go, regardless of his seniority.

5. HIRING AND PROMOTION GOALS

Once contractors are found to be underutilized, they are required to establish hiring or promotion goals and timetables for completing these goals. OFCCP's regulatory approach in this area is crucial because a failure to incorporate flexibility and to allow for mitigating circumstances into the development and administration of goals and timetables will turn these requirements into quotas. Quotas have no place in the Executive Order program and, interestingly enough no witness at the hearings testified in favor of them. As Joseph Rauh, Vice President of the Americans for Democratic Action, noted in his testimony,[147]

> I think an employer has a right to say, "I could not find qualified people for the goals and timetables." I think he has a right to say that. I do not believe that he should go out and, by a quota, be forced to hire unqualified people. To me the preference is among qualified people.

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[145] Hearing record, July 29, 1981, p. 68.
[146] Id. at p. 72–73.
[147] Witness, Joseph Raugh, Dec. 8, 1981.

Several witnesses emphasized the importance of goals and timetables. For example, Carol Grossman stated that ". . . numerical goals and timetables are the best available methods for determining whether an affirmative action program designed to combat employment discrimination has proven effective." [148] Althea Simmons argued that goals were the only reviewable standard for determining whether a contractor engaged in good faith efforts.[149] She went on to address the issue of the possible disadvantage that numerical goals may have on majority males, concluding: [150]

> When used to militate the effects of hundreds of years of invidious discrimination in the public workforce, however, goals and timetables become objectionable to some who feel that they are disadvantaged by the same. I submit that objections to the use of goals and timetables to measure progress to eliminate discrimination from the public work force are, in fact, objections to providing any remedy to this malady, and must be given short shift.

There was extensive testimony, however, indicating that OFCCP was not always taking the necessary steps to insure that goals and timetables were not used as "defacto quotas." Of special concern were the agency's use of goals as a measurement standards and the ramifications of imposing a numerical requirement of preference.

a. Regulatory Requirements

According to OFCCP's regulations, once underutilization is identified in a job group, a contractor must establish a goal and timetable to correct the deficiency. Goals are expressed as both numbers and percentages,[151] and a contractor must establish both an ultimate goal and an annual goal or annual placement rate. A specific timetable for achieving the ultimate goal in the shortest feasible time period also must be included within the affirmative action plan. Ultimate goals should equal availability, but annual goals "must usually be higher than the ultimate goal if the ultimate goal is ever to be achieved." [152]

In other words, contractors must hire minorities and women at an annual rate which is higher than their availability. The agency apparently feels that these inflated levels are necessary to stimulate change and that contractors must assume the burden of increasing availability levels. By its own regulations, OFCCP requires contractors to reserve more job opportunities for minorities or women than they would be entitled to if one contractor was hiring in a nondiscriminatory manner. Moreover, OFCCP states that failure to accomplish 95 percent of a goal within the established timetable will be viewed as failure to meet the goal, resulting in additional scrutiny of the contractor's employment policies.[153] Given these factors and the regulations which require inflated availability estimates, it is readily apparent why some contractors view goals and timetables as employment quotas.

b. Ramifications of a Numerical Requirement of Preference

OFCCP has always asserted that the difference between goals and quotas lies in the "good faith efforts" defense, but several witnesses

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[148] Hearing record, July 30, 1981, p. 42.
[149] Id. at p. 685.
[150] Id., at p. 684.
[151] 41 C.F.R. § 60–1.40(c).
[152] "The Office of Federal Contract Compliance Programs Speaks," Harcourt, Brace & Jovanovich, p. 192.
[153] See OFCCP Compliance Manual, § 2–30.4, §§ 2–200.3–2.200.3(j).

claim that this difference has broken down. As the United States Chamber of Commerce noted in its statement,[154]

> In practice, there has always been a substantial question on whether goals and timetables are simply euphemisms for quotas. OFCCP has maintained that they are not, that they are merely targets. It claims that failure to meet a goal will not result in noncompliance if a contractor can demonstrate to the agency's satisfaction that "every good faith effort" to implement the goal has been undertaken. For example, a contractor who falls short of a goal will not be held responsible if it can prove extenuating circumstances, such as an unanticipated decrease in the rate of employee turnover or the cancellation of a major contract that would have generated more job opportunities. In the real world, however, the distinction between a "goal" and "quota" is often blurred. For example, a lower level supervisor may be kept informed of the goal or goals for his shop or department and is aware that promotion or salary improvement may depend in part on his ability to meet these goals. To him, goal clearly means quota.

In a similar vein, Ronald M. Green testified:[155]

> The goal has not retained its original purpose as a measuring yardstick. It is no longer simply a guage of progress; it is in all too many circumstances a de facto quota. The contractor maintains the equivalent of a burden of proof to determine why, despite his or her best efforts, this goal qua quota was not met. For some contractors, especially the smaller ones, the failure to reach that goal and satisfy the OFCCP—which is investigator, prosecutor, and judge in the administrative, proceedings they commence—is a death sentence.

The testimony also revealed that for some the dissatisfaction with goals lies not in their use conceptually, but in OFCCP's regulations governing the establishment of goals and timetables. For example, John Bridge, who appeared on behalf of the Associated Builders and Contractors, testified:[156]

> Let me comment, in regard to goals, whenever the word goals comes up it automatically brings up the word quotas. Certainly goals, the concept of goal or the dictionary definition is fine, and we have no problem with the word goal. However, too often that is transferred over either overtly or covertly to the word quota and then we have a big problem. I think that 6.9 percent women is a typical case of something which is set as a quota goal and which has proved out to be entirely unreasonable. Now one of the statistics to back up the unreasonable nature of the 6.9 percent quota goal is the fact that in training programs and in apprentice programs throughout the country, generally speaking the average is 2.5 percent women.

Two witnesses, however, questioned the value of goals. Dr. Walter Williams was concerned with unanticipated consequences of timetables and goals. He stated:[157]

> Timetables and goals and the general program of quotas has some effects that are unanticipated. First of all, when you make it very difficult for an employer to fire somebody, you make him less willing to hire him.
>
> Let's take the university, the arena I am more familiar with. Many, many universities, particularly high-powered universities, as a standard course of business they fire young professors at the end of 2 years. However, when it comes to blacks, because of affirmative action a lot of times they find it very difficult to fire blacks because of their fear of racial discrimination suits or, in the case of women, sexual discrimination suits. Therefore, they have a lower willingness to hire them in the first place.
>
> Now the blacks who benefit from this kind of action are the blacks with proven track records, that is, blacks who have publications where the university does not have to worry about ever firing him and facing hundreds of thousands of dollars of discrimination suits. Therefore, what I am saying is that the black who bene-

[154] Hearing record, Oct. 22, p. 346.
[155] Witness, Ronald M. Green, Dec. 8, 1981.
[156] Hearing record, October 22, 1981, p. 555.
[157] Witness, Dr. Walter Williams, Dec. 8, 1981.

fits from the quota programs in the United States and all the laws surrounding a quota are the very blacks that do not need the help in the first place. They tend to be the cream of the crop.

* * * * * * *

I said 10 years ago that affirmative action has heard its death knell, and the reason why is that a program is not likely to be politically viable if it creates perceived benefits for a minority at perceived high cost for the majority. Many, many white people around the United States are having misfortune that does not have anything to do with blacks but they can feel some sense of comfort by blaming their misfortune in terms of employment on affirmative action. A lot of employers use affirmative action or goals and timetables as reasons to not hire people in the first place. They say, "Well, I cannot hire you. I have to hire a black." That may have nothing to do with it but it is an easier way of telling somebody that you cannot hire them.

Dr. Nathan Glazer questioned the underlying premise behind the use of employment goals—that they have an impact upon minority and female employment levels.[158]

I find it very hard to think that affirmative action and this enormous enterprise we are engaged in of goals, timetables, reviews, paperwork, and so on will do much about what are the really large and substantial problems of the black community, that is, high levels of youth unemployment. As has been pointed out by other witnesses here, regardless of affirmative action, regardless of the pressures of the goals and timetables approach, the employer looks for the best-qualified person that he can hire. Even if he is hiring under quota, he looks for the best-qualified person in the quota he must fulfill, and that best qualified means that he very rarely gets to this large pool of black youth who have emerged with poor education, poor skills, and who do not look to him like good bets.

* * * * * * *

If it were the case that the great change we have seen, at least in the area of employment for blacks, was owing to goals and timetables, and if it were the case that we might expect other great changes in terms of reducing unemployment of black youths, then I would support this approach.

However, I do not think these changes are the result of the goals and timetables approach. I think at least as important as the Civil Rights Act of 1964 and the enforcement of antidiscrimination laws, at least as important are very substantial changes in attitudes that we have seen in this country, such discriminatory attitudes are not only less respectable but simply less evident and less in existence than they were. At least as important is that there has been a substantial change over the past 15 years, an enormous change, in the average level of educational achievement among blacks.

It is for this reason that I think the second set of considerations that we have to take into account in considering affirmative action, and I mean the goals and timetables approach, really to my mind becomes important. I believe it is repugnant to the American people to make distinctions by race and ethnic background, with the requirement that some groups be favored above others. There is no point getting into semantics over whether affirmative action requires favoring; it does. I believe in favoring if this is done voluntarily. I have sat on search committees in my university and in others. I have sat on appointment committees, and again and again we have been affected by the consideration that we want minority students, we want minority faculty, and we will make special efforts to look for them and to do something to get them admitted and employed.

Therefore, basically I will now conclude by saying the major economic issues that we face in our largest minority group will not be, to my mind, affected much by affirmative action requirements and the enormous burden they impose on employers.

6. REGULATION OF ACADEMIC INSTITUTIONS

There was also significant testimony concerning the importance of OFCCP's compliance reviews of academic institutions and the special

[158] Witness, Dr. Nathan Glazer, Dec. 8, 1981.

problems that arise during these reviews. Several civil rights representatives felt that a strong federal program was necessary to insure affirmative action progress at colleges and universities, citing two principle reasons. First, there is a need for role models. According to Carol Grossman,[159]

> If we are not going to perpetuate the patterns of the past, the next generation of students must seem men and women of all races as thinkers, teachers, and creators. As the hair of this Committee pointed out in his statement of October 22, full educational experiences may be as important a determiner of future economic status as the absence of employment discrimination.
>
> That women and minorities have traditionally been excluded from facilities across this country cannot be denied. Institutions of higher education must, as other employers, take affirmative steps to remedy this problem both by practicing nondiscrimination and by putting into place processes which will assure women and minorities a share of the Federal dollars which support those institutions. Only by focusing on process and results will permanent change come about.

Secondly, there was concern that without a strong program, academic institutions would not be committed to affirmative action. As one witness theorized,[160]

> We cannot help to conclude, though, that but for the existence of the WEAL consent decree which forces OFCCP to use the procedures and remedies available to it, neither Harvard nor the Colorado School of Mines would have yet been required to address their poor records in hiring, pay and promotion.

Other witnesses testified, however, that the problems with OFCCP were not ones of "support for affirmative action" or willingness to hold accountable by OFCCP but of the regulatory process itself. First, there is the issue of the organizational differences between a university and a corporation. Dr. Arthur Hansen, President of Purdue University, addressed this problem when he testified,[161]

> One of our problems is that OFCCP procedures for monitoring our university assume and impose a highly centralized industrial management model. This approach simply does not provide an appropriate analysis of the collegiate environment. This lack of sensitivity of knowing who we are and what we are like, creates serious conflicts.
>
> We are different from companies, from banks, and from manufacturers. Yet when we have had reviewers come to review us they have referred to us in many cases as "the company." Even in the case of correspondence we are referred to as "the plant." The implication is that we are no different, for instance, than a corporation.
>
> This has led to such things as assuming that we hire centrally, that there is somebody "up there" that does all the hiring for us in a central administrative office. There is a feeling oftentimes that we promote by seniority, which is not true at any university that I am aware of.

Second, there is the issue of the relationship between academic institutions and the government. According to one witness,[162]

> The second point I wish to emphasize is the equally disturbing perception of a growing adversary relationship between OFCCP and the university administration. We feel a deep sense of frustration and mistrust which undermines the productivity of our common effort. Although compliance review manuals state that OFCCP is to furnish technical assistance, very little meaningful help has been provided. On the contrary, when data furnished were not exactly in the proper format, we were suspected of trying to cover up problems.
>
> How do we deal with this? We yield to the pressure, and do what is required, very often expending efforts and resources redesigning computer programs to satisfy what we have come to view as whimsical demands. In this defensive pos-

[159] Witness, Carol Burroughs Grossman, Dec. 8, 1981.
[160] Id.
[161] Hearing record, July 30, 1981, at p. 197.
[162] Id., at 210.

ture, we cover only items asked for, and end up losing sight of the spirit of the law but following the letter of the regulations (as least as perceived by reviewers!)

Like other contractors, universities also have problems with irregularity of enforcement among OFCCP's regional offices. The American Council of Education made the following assertion: [163]

We are now also experiencing regional differences in the manner in which OFCCP compliance officers handle questions regarding treatment of confidential faculty peer review files gathered in the course of Executive Order compliance reviews. University contractors have a legitimate concern about the availability of such records to the public at large under the terms of the federal Freedom of Information Act. A carefully negotiated procedure contained in a consent order entered by then Secretary Marshall against the University of California at Berkeley mitigates to some extent these concerns. Some regional officials recently have refused to sign conciliation agreements that contain verbatim the language of the Berkeley order. This is the case despite the existence of an unrescinded directive by former Secretary Marshall to the Assistant Regional Administrators that instructs them to protect to the greatest extent possible the privacy of these important records.

Finally, there is the issue of availability. A frequently cited statistic is the number of minorities and women who hold Ph. D.'s who are unemployed, implying that this high rate is solely because of discrimination. For example, Bernice Sandler, representing the American Jewish Committee, asserted that,[164]

For example, in the area of higher education the unemployment rate of women with Ph.D.'s in the social sciences and sciences is about two to five times that of men with Ph.D.'s. In history, the unemployment rate of women with Ph.D.'s ready and willing to work is 10 times that of men with similar Ph.D.'s

The realities of this assertion may be somewhat different, however. Estelle Fishbein, who knows firsthand the problems of trying to attract individuals to academic positions which are not considered favorable stated: [165]

Moreover, OFCCP ignores the reality that not every person who secures a doctorate desires employment in a college or university. In fact, in a highly developed and industrialized society the holder of a doctorate in the sciences is likely to have ample employment opportunities in industry which offer higher potential life time earnings than can be attained in an academic career. Then, too, the regulations do not recognize that colleges and universities in rural areas are at a significant recruiting disadvantage and cannot attract women and minorities as easily as urban academic institutions. Neither the regulations nor OFCCP personnel acknowledge the natural reluctance of people to abandon ties of family and friends to accept employment at a remote location.

In sum, these witnesses highlighted some of the unique problems affecting academic institutions, as well as those concerns which they have in common with other contractors. When viewed in general, academia's experience with OFCCP is very similar to that of business and industry. Again, the message clearly articulated in this portion of the testimony is not that the Executive Order program should be repudiated but that there must be a more sensible means for furthering the program's objectives.

7. THE EVOLUTION OF THE PROGRAM'S OBJECTIVES

At least some of the confusion and consternation over the regulations reflects an uncertainty as to the ultimate objective of the Execu-

[163] Id., at p. 221.
[164] Witness, Bernice Sandler, December 10, 1981.
[165] Hearing record, July 30, 1981, at p. 262.

tive Order program. Initially, it seems clear that the Executive Order 11246 was prospective in focus, designed to force contractors to reach out to minorities and women, to train, upgrade and counsel. Affirmative action was to be required only for the purpose of avoiding the use of race, sex or color-conscious decisionmaking in the employment progress of government contractors and subcontractors.[166]

By the early 1970's, however, this prospective focus began to change. As related in the testimony of Mr. Ronald M. Green, who was a participant in these events,[167]

> There was at that time an effort made to merge the OFCCP with the EEOC. Some wanted to abolish the OFCCP and the reason was as stated by the former witness, Mr. Goldstein: There was none then, there is no way now, of measuring the number of placements effected for minorities and women under the contract compliance program.
>
> Therefore, how is the OFCCP to justify its budget and its reason for existence? . . . It converted . . . to a retrospectively oriented program. . . .

This retrospective orientation was followed by a future evolution away from opportunity towards parity. Today, compliance with the Executive Order is not measured in terms of good faith efforts or opportunities for employment but in terms of actual employment. The critical question seems to be how many minorities and women hold jobs in your company, and not whether the company is acting affirmatively to insure that its employment policies and actions are nondiscriminatory. This development was noted by the EEAC, which stated:[168]

> There is also confusion as to whether the purpose of the program is for contractors to use affirmative action to establish equal employment opportunity evidenced by job mobility or to achieve employment parity measured by the number of jobs actually held by minorities and women Over the last several years OFCCP officials apparently have adopted the latter objective. Current regulations indicate that under the Executive Order program equal employment opportunity is achieved only when there is an exact numerical equivalency between the representation of minorities or women in a given job and their representation in the appropriate labor pool for that job. Such exactness leaves little room for the numerous vagaries other than discrimination that give rise to differences in representation.

The consequences of this evolution have not enhanced the effectiveness of the program, because the agency's new focus has removed any chance for cooperation between contractors and the government. Today, each action by a corporation affecting or increasing affirmative action must be initially viewed in terms of legal liability. Contractors are understandably reluctant to experiment, to take risks, because little attention is given to success or substantive improvements. Compliance officials seem more interested in the form of a contractor's affirmative action program than in the content. As Jose Cano, Chairman of the American G. I. Forum, testified:[169]

> In fact, on the whole, employers that actually improve the representation of minorities and women within their work force and throughout their personnel actions are no less subject to the Office of Federal Contract Compliance Programs' voluminous documentation requirements consisting of complex analysis of applicant flow, progression line charts, progression sequences and availability, among other things.

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[166] Hearing record, December 8, 1981, pp. 30–31.
[167] Witness, Ronald M. Green, December 8, 1981.
[168] Statement, EEAC, Dec. 10, 1981.
[169] Hearing record, July 29, 1981, p. 63.

This is particularly difficult to justify where oftentimes such employers are cited for technical deficiencies such as posters, EEO statements, et cetera, causing the employer to be placed under a letter of commitment or some other requirement imposing additional paperwork on the employer.

Not surprisingly, these types of procedures break down the incentive for the employer to continue efforts that have resulted in the adequate representation of minorities and women in their work force.

Ms. Fishbein put it most succinctly when she stated: [170] Affirmative action should be working with people and not working with paper.

Recently, much attention has focused on whether there is a correlation between affirmative action and parity. If affirmative action is interpreted to be synonymous with employment parity and, thus, the objective of the Executive Order program is employment parity, the critical question becomes what constitutes parity. OFCCP believes that parity would be achieved when minorities and women are found in all jobs at a rate equivalent to what their representation would be absent discrimination. The agency presumes, however, that any difference in job selection among races, ethnic groups and the sexes is a function of employer discrimination, not employee preference or choice. As a result, if 20 percent of Salt Lake City's population is Hispanic, 20 percent of all electricians, lawyers, brick masons, teachers, etc., would have to be Hispanic for there to parity.

Obviously, it will be extremely difficult to satisfy this objective because differences in occupational selection are not simply a function of discrimination. More importantly, however, this objective far exceeds the original intent of the Executive Program or even a logical interpretation of parity, as evidenced by the following exchange between Althea T. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People, and Senator Orrin G. Hatch.[171]

The CHAIRMAN. You say that the objective of Executive Order 11246 is to achieve parity. What do you mean by parity?

Ms. SIMMONS. By parity, we mean that there is a fair representation of blacks, Hispanics, and women in all areas and all levels of employment. Fair representation means persons who could reasonably be expected to have been in the work force absent discrimination. We do not pull up a magic number. We are talking in terms of giving people the opportunity to move forward in the work force.

The CHAIRMAN. Assuming that parity is achieved, would that then do away with the necessity of affirmative action programs?

Ms. SIMMONS. As a matter of fact, back when the affirmative action guidelines were put in place, we felt it was a 5-year program because affirmative action, we believe, should be designed to remove the barriers. Once the barriers are removed, then you move into neutrality.

At first, Ms. Simmons seems to concur with OFCCP's definition of parity, but her next statement indicates a profound difference of opinion. For her, affirmative action represents the breaking down of barriers so that individuals would be judged on the basis of the skills they possess not on the basis of their race, ethnicity or sex. OFCCP, on the other hand, views affirmative action as the mechanism for restructuring the American workforce so that it reflects the numerical homogeneity that the agency desires, regardless of individual interests or preferences. Consequently, OFCCP officials are bothered by the fact that the

[170] Hearing record, July 30, 1981, p. 276.
[171] Hearing record, July 30, 1981, p. 314.

workforce has not caught up with their personal perception of what society ought to be.

As noted earlier, the probable cause of this evolution was the inability of OFCCP to develop a mechanism for measuring the impact of its regulations. According to Ms. Simmons, OFCCP does not have any figures showing how its requirements increased job opportunities for minorities and women.[172] Whether, it is impossible to develop such data is uncertain but it clearly indicates why a bureaucracy would be interested in turning to such an identifiable and understandable measure as front or back pay.

What is particularly perplexing, however, is the agency's fascination with debarment, as evidenced in the Prudential experience.[173] Debarring a contractor would seem to do little to increase the number of employment opportunities for minorities and women. If debarred, the contractor would be not required to engage in affirmative action, because it would be beyond the pale of OFCCP's authority. James Nixon summed up these concerns most accurately when he commented.[174]

> . . . the present enforcement effort, it seems, relies heavily on extremely detailed procedures, instructions, and statistical analyses. That has been talked about before. However, it also relies on an OFCCP self-monitoring system. By that, I am referring to the headcount that Ms. Simmons referred to: the number of contractors debarred, the number of show causes issued, the amount of back pay extracted, and so forth, which we in my corner of the profession refer to as the dead body count. That is the self-monitoring system that the agency uses. As such, it tends to reinforce the adversarial or punitive image that I mentioned before.
>
> Furthermore, the program presently lacks a scorekeeping mechanism which would encourage both the Government and the contractor not so much to count the dead bodies but rather to count live bodies, or, in other words, to focus on short- and long-range efforts to develop and/or open up job opportunities for females, minorities, or handicapped individuals by novel recruitment programs or internal upward mobility efforts such as those referred to earlier by Dr. Hansen of Purdue.
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> In fact, while the present program was designed to accomplish the purpose of looking at these longer and short range novel programs, the program almost achieves precisely the opposite effect by encouraging the contractor and the government to focus on analytic procedures and detail which is enhanced by what I call creative journalism.

8. THE MONETARY AND ADMINISTRATIVE COST OF COMPLIANCE

One of the most shocking revelations from the five days of hearings was the actual cost of the OFCCP's programs. There is a tendency to presume that government regulations only involve isolated incidents or that employers can withstand any monetary requirement placed upon them. The witnesses made it clear that compliance with OFCCP's requirements cost American businesses and industries and, thus, the taxpayers of this country more than $1 billion each year.[175] This figure represents simply the administrative cost of compliance and does not include the cost of any remedial relief or legal fees arising from compliance reviews. Equally alarming is the waste in the program caused by its unnecessary paperwork requirements. One can only wonder if OFCCP sometimes measures compliance by pounds and dollars instead of by good faith efforts.

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[172] Id. at p. 314.
[173] Hearing record, July 29, 1981, at p. 29 and following.
[174] Hearing record, July 30, 1981, pp. 332–3.
[175] Hearing record, July 29, 1981, at p. 34.

a. Monetary Cost

Contrary to the common perception, major corporations that are federal contractors are spending substantial amounts of money because of the government's affirmative action regulations. The Prudential Insurance Company, for example, spends more than $5 million each year in connection with OFCCP's requirements. In fact, the Fortune 500 companies alone apparently spend $942 million each year on OFCCP's requirements.[176] These figures do not represent the cost of individual compliance reviews, which are an equally expensive component of OFCCP regulations. The National Bank of Greenwood, a small Indiana bank employing only 138 individuals, was forced to spend over $100,000 and 4,000 hours of time during a single compliance review.[177] The Senate Labor Committee found that those contractors responding to its pilot survey were spending an average of $25,000 during compliance reviews on data requests by the agency alone.[178] One can only wonder whether the cumulative expenditure by these contractors during compliance reviews of over $65 million dollars in Fiscal Year 1981 had a discernible impact on increasing job opportunities for women and minorities.[179]

b. Paperwork Burden

Although the term "burdensome paperwork" has become almost a cliche in government circles, much of OFCCP's excessive costs are directly attributable to agency demands for data. By the time Johns Hopkins University had finished a compliance review, it had prepared and submitted 65 pounds of paper, measuring more than 2½ feet in height. Another company was required to prepare a five foot high stack of paper, weighing 158 pounds during a compliance review.[180] In fact, the Senate Labor Committee's survey indicated that OFCCP's data demands during a compliance review necessitated the filing an average of 1,000 pages in addition to the written affirmative action program.[181] Given that the average affirmative action program is approximately 400 pages in length, OFCCP required contractors to submit more than 3.6 million sheets of papers in fiscal year 1980.[182] With a professional and clerical staff of only approximately 1,400 persons, one can only wonder what was done with all of the paper. Certainly most of it was not subjected to careful review and analysis.

C. Legal Issues

1. EXTENT OF COVERAGES

It often has been said that the federal bureaucracy is self-perpetuating, and that a program once developed will not remain constant, but inevitably will expand. While the Reagan Administration is mounting an admirable challenge to this hypothesis in many areas of govern-

[176] Hearing record.
[177] Hearing record, July 29, 1981, p. 165.
[178] See Appendix A.
[179] This is based on OFCCP's estimation that, in fiscal year 1981, it conducted 2,632 compliance reviews.
[180] Hearing record, July 30, 1981, p. 293.
[181] See Appendix
[182] This figure also is based on OFCCP's statement that, in fiscal year 1980, it conducted 2,632 separate compliance reviews.

ment, those who subscribe to the traditional view may nevertheless point to OFCCP even under the Reagan Administration as a classic example of an agency that is constantly trying to expand its authority. Witnesses cited two principle examples—assertion of jurisdiction over additional contractors and contractor facilities having marginal, if any, impact on federal procurement, and the regulation of an ever-expanding range of employment practices.

OFCCP has increased the number of covered contractors in several ways. First, the original exemption of contracts and subcontracts not exceeding $10,000 contained in 41 C.F.R. § 60–1.5 of the regulations has never been adjusted for inflation with the result that an increasingly large number of contractors having relatively small federal contracts and few employment opportunities are becoming subject to E.O. 11246 requirements.[183] Second, the agency insists upon asserting jurisdiction over low-level subcontractors having little impact on federal procurement. This practice was circumscribed by the Fourth Circuit Court of Appeals in *Liberty Mutual Insurance Company* v. *Friedman*.[184] In that case the court determined that OFCCP could not apply E.O. 11246 to a company which was not itself a federal contractor, but which provided workers' compensation policies to companies which were. According to the court, there was an insufficient nexus between the services provided by Liberty Mutual and policies underlying E.O. 11246 to support OFCCP's assertion of jurisdiction. Under this decision, OFCCP must demonstrate a relationship between its assertion of jurisdiction and a specific grant of Congressional authority.

A second method for expanding OFCCP jurisdiction has been to apply E.O. 11246 to facilities and subsidiaries of federal contractors having no relationship, direct or indirect, with any federal contract. Notwithstanding § 204 of the Executive Order and 41 C.F.R. § 60–1.5 (b) (2) of the regulations which provide for the exemption of facilities which are "in all respects separate and distinct from activities . . . related to the performance of the contract," OFCCP has in the vast majority of cases insisted upon contractor-wide coverage whenever a single facility has a covered contract. Rather than acknowledging and rectifying this problem by granting reasonable exemption requests, however, OFCCP at the present time is considering a proposal to expand its jurisdiction further by covering all on-site employees of federal construction contractors, even those working on job sites which are neither federal nor federally-funded.[185]

2. RELATIONSHIP BETWEEN THE RESPONSIBILITY OF OFCCP AND THOSE OF EEOC

In addition to expanding the size of the covered contractor universe, OFCCP also has extended its jurisdiction by asserting the right to regulate employment practices unrelated to affirmative action.

[183] The agency recently has proposed deleting the current requirement that contractors with federal contracts which aggregate to more than $10,000 in any 12-month period also are covered by the Order. 46 Fed. Reg. 42970 (1981). Although helpful, this modification will be insufficient to offset the tremendous impact of inflation.

[184] 639 F. 2d 164, 169 (4th Cir. 1981) :

[185] See 46 Fed. Reg. 36215 (1981).

Title VII of the Civil Rights Act of 1964, [186] prohibits employment discrimination on the basis of race, color, religion, sex and national origin, and provides injunctive and compensatory relief for individuals who have been discriminated against. Executive Order 11246 as amended by Executive Order 11375 requires more than passive nondiscrimination; it requires federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." [187] Contractors which fail to honor this affirmative action obligation are subject to a variety of contractual sanctions and penalties set forth in § 209 of the Order, including debarment from further government contracts.

The Title VII admonition against discrimination and the E.O. 11246 obligation to undertake affirmative action are complementary, but distinct. Lawrence Lorber, Director of OFCCP under the Ford Administration, noted that affirmative action is "a supplementary obligation to ensure compliance with Title VII . . . [and] does not substantively go beyond Title VII. That is, the affirmative action obligations do not create a higher standard, but rather *require extra efforts to reach the statutory goal of nondiscrimination.*" [188] This view was shared by another former Department of Labor official, Ronald M. Green, who noted that the "use of affirmative action [in E.O. 11246] is carefully circumscribed. It says that affirmative action is to be required only for the purpose of avoiding the use of race- or sex- or color-conscious decisionmaking in the employment process by Government contractors and subcontractors." [189] Nondiscrimination *prohibits* certain conduct. Affirmative action requires certain conduct.

The philosophical underpinnings for the Executive Order program were summarized in the statement submitted by the Equal Employment Advisory Council. EEAC noted that OFCCP's affirmative action program:

> [i]s based on the conviction that more was needed to remedy societal and employment discrimination than simply the assurance of neutrality in personnel decisions. Policies which prohibit discrimination against equally qualified candidates tend to benefit only those minorities and women who already are qualified for and interested in the positions sought. For the many minority and female candidates who are interested but unqualified due to economic or educational disadvantage, affirmative steps have been needed to make them both qualified and aware of their rights and opportunities. Thus, OFCCP was charged with ensuring that all federal contractors and subcontractors not only refrain from discriminating against individuals or classes, but also take affirmative action to ensure the equality of employment opportunities. This affirmative action requirement is met in most instances by the development and implementation of an affirmative action plan (AAP) containing hiring and promotion goals for minorities and women. In addition, contractors are required to develop AAPs without goals for handicapped individuals and Vietnam veterans.[190]

In the years immediately following issuance of E.O. 11246 in 1965, OFCCP and industry joined in a largely cooperative effort to develop and monitor programs designed to enhance the employment and promotion prospects of women and minorities. The emphasis clearly was

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[186] 42 U.S.C. § 2000e et seq.
[187] E.O. 11246, § 202.
[188] Witness, Lawrence Lorber, December 10, 1981.
[189] Witness, Ronald M. Green, December 8, 1981.
[190] Statement, EEAC, December 10, 1981.

on the placement of women and minorities in productive jobs. Since that time, OFCCP has slowly but unmistakably shifted its emphasis from monitoring contractor affirmative actions efforts to seeking monetary and other remedies for what it views as past discrimination. The emphasis now is no longer in securing minority and female job placements in future employment decisions, but rather on securing monetary relief for "affected classes" which the agency defines as individuals who by virtue of past discrimination continue to suffer the present effects of that discrimination." [191]

There are several possible reasons for this transformation. EEAC suggests that "it may have stemmed from a need to provide a tangible product for the contract compliance program for Congress during appropriation hearings. In other words it was easier for agency officials to point to a total amount of back pay collected than to attempt to explain the significance of a variety of individual contractor's good faith efforts." [192] This conclusion is confirmed by Mr. Green who was employed at the Department of Labor during this period of time:

> There was at that time an effort made to merge the OFCCP with the EEOC. Some wanted to abolish the OFCCP and the reason was as stated by the former witness, Mr. Goldstein: *There was none then, there is no way now, of measuring the number of placements effected for minorities and women under the contract compliance program.*
>
> Therefore, how is the OFCCP to justify its budget and its reason for existence? It converted in 1971 to a different type of program, not to a prospective partnership between Government and industry calling for the voluntary establishment of goals, truly goals, benchmarks or yardsticks to measure progress, to gauge results, keyed to the good faith efforts at the implementation of these numerical objectives. *It converted from that instead to a retrospectively oriented program designed to punish for past misdeeds*, to link the eligibility for future Government contracts not upon promises of future performance and gauges of future performance but upon misdeeds, upon correcting for no limited period of time, wrongs which the OFCCP perceived, to restore to their rightful place people that for whatever reason—for reasons perhaps unrelated to a contractor's own employment practices—were not where in the OFCCP's opinion they ought to be.[193]

Regardless of the precise reason, however, OFCCP has evolved into an agency which largely duplicates the mission of EEOC in remedying past discrimination against individuals and affected classes. This transformation has had several identifiable consequences. Among the more significant is that agency resources which might effectively be used to enhance affirmative action have instead been diverted into an area which now properly falls within the province of another agency. Nearly all federal contractors subject to E.O. 11246 also are subject to Title VII. According to the statement of EEAC:

> This duplication has led to competition between the agencies to negotiate the largest back pay awards or sue the biggest and most visible corporations. This competition is compounded by the mistaken presumption by officials at the two agencies that rigorous enforcement efforts against major companies will push smaller firms into compliance without any direct governmental involvement. The only real consequence of these developments has been that large corporations tend to be constantly undergoing reviews, and that investigation by one agency is no bar to a simultaneous or subsequent investigation of the same employer by the other.

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[191] See, 41 C.F.R. § 60–2.1(b) and U.S. Department of Labor, Office of Federal Contract Compliance Programs Federal Contract Compliance Manual, § 1–60.3, p. 1–4 which defines "affected classes" as "one or more employees, former employees, or applicants who have been denied employment opportunities or benefits because of discriminatory practices and/or policies by the contractor, its employees, or agents."

[192] Statement, EEAC, December 10, 1981.

[193] Witness, Ronald M. Green, December 8, 1981 (emphasis added).

The First Alabama Bank of Montgomery is an example. The bank was sued by the EEOC in 1969. The litigation culminated in a court order pursuant to which the court monitored the EEO activities of the bank through quarterly compliance reports. The reports were filed for more than six years until the court determined in August of 1979 that they no longer were necessary. During the reporting period three E.O. 11246 compliance reviews were conducted, all of which resulted in determinations that the bank was in compliance. Three months following court termination of the reporting requirement, OFCCP commenced yet another compliance review which would have encompassed many of the same issues involved in the Title VII litigation and earlier compliance reviews. The bank refused to submit requested data contending that the ongoing investigations were unnecessary burdensome and expensive. On March 16, 1981, the bank was debarred for failure to cooperate in the compliance review. *OFCCP v. First Alabama Bank of Montgomery*, 80-OFCCP-32 (March 16, 1981). Quite apart from whether the bank's refusal to cooperate was a technical violation of E.O. 11246, there remains a serious question whether OFCCP's selection of the bank for yet another review constituted a wise allocation of the agency's limited resources in light of the extensive earlier compliance activities.[194]

These concerns were echoed by James I. Nixon, Vice President of ITT, and James J. Graham who testified on behalf of the EEO Policy Committee of the Business Roundtable. According to Mr. Nixon:

This inefficiency of coverage is further exacerbated by the overlapping jurisdiction and efforts of OFCCP and EEOC. For instance, when OFCCP officers become bogged down in the investigation and resolution of individual complaints, . . ., the result is not only a much prolonged and generally no more effective review of the systemic program of the individual contractor, but it also results in significantly less time and resources available to review other contractors. In addition, this frequently results in a situation where skills and philosophies which were developed for the OFCCP's prospective mission are possibly inappropriately applied to the solution of retrospective problems, a task which many of us feel is more appropriately and more effectively carried out by the EEOC. The bottom line of this is that significantly fewer contractors can be reviewed and counseled by the limited resources of the OFCCP, resulting in a program which is less effective, and I think considerably so, than it could be.[195]

Mr. Graham testified that:

The issue between OFCCP and EEOC, I think, can be sharply defined. Each Agency appears to be trying to do the same thing. The EEOC has been set up to enforce antidiscrimination laws either by hearings or investigations initiated by that Agency, as well as provide an opportunity for individuals to come in and claim that they were discriminated against. The fact is that a considerable amount of that is going on. The problem with the OFCCP is that they are trying to do the same thing. What has really fallen between the cracks over the past several years is that the affirmative action aspects of OFCCP, which was its original purpose—to encourage employers who wanted to do business with the Government to do something more. Do something more in what respect? To discriminate less? That is illogical, because you have EEOC that says you cannot discriminate. So what is it? It is to do something more to improve the supply of minorities and women in the workforce, so that they can be better able to take advantage of employment opportunities. That is the orientation that has been missing in the past few years.[196]

3. BACK PAY AND OTHER RETROSPECTIVE REMEDIES PURSUED UNDER E.O. 11246

Contractors which fail to fulfill their contractual obligations under the equal employment opportunity clause are subject to the sanctions and remedies set forth in § 209(a) of the Order. They include:

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[194] Statement, EEAC, December 10, 1981.
[195] Hearing record, July 30, 1981, p. 333.
[196] Witness, James W. Graham, December 8, 1981.

(1) Publication of the firm name on a list of contractors in noncompliance.

(2) Referral of substantial or material violations to the Department of Justice for commencement of civil breach of contract lawsuits;

(3) Referral to the EEOC or Department of Justice for commencement of Title VII lawsuits;

(4) Referral to the Department of Justice for commencement of criminal proceedings relating to the furnishing of false information;

(5) Cancellation, termination or suspension of all or portions of existing federal contracts; and

(6) Debarment from further contracts or extensions or modifications of existing contracts.

Section 209(a) of E.O. 11246 is detailed and specific as to the sanctions that are available. Significantly, it contains no residual clause permitting "such other remedies and sanctions as the Secretary shall deem appropriate." It sets forth a finite list of specific sanctions which may be imposed by the Secretary. These sanctions are of two basic types: (1) contract remedies directed at foreclosing the contractor from further government contracting (items (1), (5) and (6) above); and (2) referral to appropriate law enforcement agencies whose express powers authorize them to seek other types of remedies (items (2), (3) and (4) above).

The common characteristic of the contract sanctions mentioned in E.O. 11246 is that they are *prospective* in operation. Their effect is to deny contractors who have violated their equal opportunity agreements access to the benefits of further or continued government contracts. This type of sanction is directly related to the covenant of a government contractor under the equal opportunity clause, which is only to take future action.

OFCCP's decision to duplicate EEOC's responsibilities under Title VII by investigating allegations of past discrimination has led the agency to seek for victims of discrimination compensatory, make-whole relief such as back pay, front pay and retroactive seniority, retroactive remedies which are not specifically authorized by § 209(a) of the Order. OFCCP did not initially claim back pay authority in its regulations, and the agency's only experience with back pay issues in the 1960's came as a result of its formally joining EEOC (through the Justice Department) as plaintiff in a number of landmark discrimination cases such, as the steel industry settlements. OFCCP did not take a lead role in these cases and its authority to claim back pay was never formally challenged.

When OFCCP amended its regulations in the early 1970's to include a bare claim to the right to require back pay for "affected class" victims, it was done rather surreptitiously, with no public debate either about the legality of OFCCP's claim or about the way in which OFCCP would exercise its back pay demands. Proposed OFCCP Guidelines on back pay and affected classes, published in 1975, were never adopted, and the agency has continued to pursue back pay with virtually no articulated standards. OFCCP's interest is for large back pay awards, and its use of such awards rather than the number of

female and minority job placements as the yardstick of its effectiveness, is primarily responsible for the conversion of OFCCP's relationship with industry from a largely cooperative one in the late 1960's and early 1970's to a true adversarial one today.

Several witnesses argued that OFCCP's demands for back pay and other forms of retroactive relief are legally vulnerable.[197] It was asserted that the President has no inherent constitutional power to legislate in the area of employment discrimination, and that the requirements of the Executive Order and its implementing regulations must be derived from authority granted by Congress.[198] The Supreme Court has emphasized that the legality of OFCCP's regulations is dependent upon "a nexus between the regulations and some delegation of the requisite legislative authority by Congress."[199] Thus, unless "under any of the arguable statutory grants of authority, the . . . regulations are reasonably within the contemplation of that grant of authority," such regulations will not have the force and the effect of law.[200]

Despite suggestions that such authority may derive from some combination of the Civil Rights Act of 1964, the 1972 amendments to that Act, and the Federal Property and Administrative Services Act of 1949, several witnesses asserted that neither these statutes nor any others contemplated the authorization of a back pay remedy in OFCCP enforcement actions.

A. Title VII of the Civil Rights Act of 1964

There is no language in the Civil Rights Act of 1964 or in its legislative history to support the grant of such authority to OFCCP. During the original debate of Title VII, Congress specifically rejected a section of the proposed bill which would have given the President unfettered discretion in preventing employment discrimination in the performance of government contracts.[201] Furthermore, Congress rejected the concept that remedies such as back pay would be available in administrative proceedings, except as part of a mutually acceptable settlement agreement. By specifying that make whole remedies would be ordered only after discrimination had been proven in Federal court, under Title VII, Congress rejected the concept of a single administrative agency which would act as investigator, prosecutor and judge in the area of equal employment opportunity.

B. Equal Employment Opportunity Act of 1972

The legislative history of the 1972 Amendments to Title VII also does not authorize, directly or indirectly, the awarding of retroactive remedies under E.O. 11246. The only published regulation purporting to authorize orders of back pay in OFCCP enforcement actions was

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[197] Many of the issues discussed in this legal summary are analyzed in greater detail in a legal memorandum submitted by the Chamber of Commerce of the United States which appears on pages 394–415 of the hearing record (hereafter "Chamber Memorandum").

[198] See Chamber Memorandum at hearing record 395 and 401–404.

[199] *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 304 (1979).

[200] Id. at 306.

[201] See Chamber Memorandum at hearing record p. 396, Section 711(b) of H.R. 7152, the bill which ultimately was to become the Civil Rights Act of 1964, provided:

The President is authorized to take such action as may be appropriate to prevent the committing or continuing of an unlawful employment practice by a person in connection with the performance of a contract with an agency or instrumentality of the United States.

not adopted until 1977, several years after the 1972 Amendments. Although OFCCP has contended that it entered into back pay settlement agreements before 1972, it cannot be assumed that Congress in 1972 was aware of or approved these informal aspects of the program, which were not part of the regulations officially promulgated under the Executive Order. Indeed, since back pay under the Executive Order was not mentioned in the 1972 legislative history or debates, it must be assumed that Congress knew nothing about any back pay settlement agreements.

The argument that the failure of Congress to modify the E.O. 11246 program in 1964 or 1972 amounts to a tacit approval of the program was rejected by the Fourth Circuit Court of Appeals in *Liberty Mutual Insurance Co.* v. *Friedman*, 639 F.2d 164 (4th Cir. 1981). As observed in the Chamber Memorandum at hearing record pp. 398–399:

> [The *Liberty Mutual*] Court noted that "ratification" or "negative authorization" of the Executive Order cannot be found to flow from the rejection of several amendments in 1972 that were intended to circumscribe the role of the Executive Order program. The Court held that:
>
> "Even if "ratification" by such a process might in some circumstances be properly found—a matter of some general dubiety when its potential effect upon the dynamics of the legislative process is carefully considered—we do not think it can be properly found here. The rejection in 1972 of a series of amendments which would have cut back the Executive Order program in existence at that time, cannot fairly be considered to contemplate a grant of authority to the Executive to extend the program . . . ."
>
> Without discussing the very strong public policy reasons for rejecting ratification of any program by inaction, the Court directed attention to a law review note that addressed the theory in depth. The article notes:
>
> "The legislative process is designed to protect the notions of open and accountable procedures and majority rule as the fountain of democracy. For this reason the legislative process places the burden of passing bills by majority vote on the proponents of the particular piece of legislation. Under the theory of ratification by inaction, however, any unsuccessful attempt to defeat or modify the Executive Order program would be tantamount to an imprimatur of that program. Such a reading improperly shifts the burden of amassing a majority from the proponents to the opponents of the legislation. It may also cause serious opponents to refrain from open opposition if the result of unsuccessful opposition is ratification of a presidential program." [footnotes omitted]

While not a single legislator referred to back pay settlements or an implicit back pay remedy under the Executive Order, numerous legislators made statements during the 1972 debate indicating that they recognized a distinction between Title VII, which provided retrospective relief for victims of proven discrimination, and the Executive Order program, which had a prospective focus and sanctions. Statements by Senator Saxbe, for example, reflect an understanding of the carefully drawn distinction between judicial remedies imposed after employment discrimination has been proven in a Title VII case and the affirmative action commitments undertaken by government contractors:

> The Executive order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case by case basis. Rather, affirmative action means that all government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.[202]

[202] 1972 Legislative History at 915.

C. Federal Property and Administrative Services Act 1949: Procurement Act

Finally, Congressional support for OFCCP's back pay policy cannot be found in the Federal Property and Administrative Services Act of 1949. The purpose of this Act is to provide "an economical and efficient" system for the procurement of property and services by the government.[203] While the Act authorizes Executive Orders "necessary to effectuate [its] provisions," 40 U.S.C. § 486(a), it does not mention employment discrimination. In examining the relationship between the federal procurement statute and the nondiscrimination requirements of Executive Order 11246, it often is argued that the nondiscrimination requirements were justified because of the strong federal interest in ensuring that the government's cost are not adversely affected by an artificial restriction of the labor pool caused by discriminatory employment practices.[204]

The conclusion in *Contractors' Association* that the federal procurement statute provides a general source of authority for Executive Order 11246 has been the subject of significant criticism and has been qualified recently by the Supreme Court. What is noteworthy about the *Contractors' Association* decision, however, is that the court clearly recognized the purely prospective nature of the compliance program. As the court stated:

> [Contractors] are merely being invited to bid on a contract with terms imposed by the source of the funds. The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. *The Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance.*[205]

Moreover, the Third Circuit did not end its analysis after it found a general source of authority for the Executive Order. It went on to consider whether there also was a source of authority for the *specific aspect of the Executive Order program which was being challenged in that case.* Such an analysis is consistent with the "nexus" test prescribed by the Supreme Court in *Chrysler* and, as the Court's characterization in *Chrysler* suggests, *Contractors' Association* should be read as holding that the procurement statute grants authority for "*some aspects of* Executive Order 11246." [206] In *Liberty Mutual Insurance Co.* v. *Friedman*, *supra*, the Fourth Circuit concluded that application of the Executive Order program to a subcontractor which underwrote workers' compensation insurance for federal contractors was beyond the scope of any grant of legislative authority:

> The key point in *Contractors' Association* is its recognition that any application of the Order must be reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement . . . in order to lie within the statutory grant. 639 F.2d at 170.

Applying these principles, it is evident that the Procurement Act cannot serve as legal support for OFCCP's policies concerning back pay and other forms of retroactive relief. Not only is there no rela-

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[203] 40 U.S.C. §§ 471 *et seq.*

[204] *See, Contractors' Association* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

[205] Id. at 176 (emphasis added).

[206] 441 U.S. at 305 n. 34 (emphasis added); *see also, A.F.L.–C.I.O.* v. *Kahn*, 472 F. Supp. 88 (D.D.C.), *reversed on other grounds*, 618 F.2d 784 (D.C. Cir. 1979). (There must exist a "close nexus" between the obligations imposed by the Executive and the "efficiency and economy" criteria of the Procurement Act.)

tionship between the prospective goals of the Executive Order and retrospective awards of back pay, but there is no nexus between reducing government procurement costs and assessing government contractors for back pay. As commentators have observed: [207]

> [it] is plainly inconsistent to assume that the back pay regulations, with their enormous impact on the contractors' costs and the resultant increase in the cost of supplies to the government, are within the scope of presidential action authorized by the procurement statutes.

Another observer has pointed out that:

> OFCCP could also be operating at cross-purposes with the anti-inflation program. *Back pay for work not actually performed is inflationary.* Imposed on the 325,000 contractors and 30 million employees subject to Executive Order 11246, this monetary remedy would have a substantial impact (emphasis supplied).[208]

The Chamber of Commerce in its Memorandum at hearing record p. 402 observes that:

> There is no Supreme Court case which has specifically construed the Procurement Act's "cost and efficiency" language. However, similar language and a similar mandate were interpreted in *N.A.A.C.P.* v. *Federal Power Commission* [425 U.S. 662, 669 (1976)]. There the Court was deciding whether a Congressional delegation of authority to the Federal Power Commission to bring "economy and efficiency" to public utilities included executive authority to regulate the utility industry's employment practices. The Court held that the Executive Branch did not have such authority, and in fact went much further and said that the only power related to employment practices is limited by the "economy and efficiency" mandate to disallowing back pay and attorneys' fees awards if they are determined to be "unnecessary costs" after a finding of discrimination judicially or administratively.
>
> It follows then that a similar lack of "nexus" exists for purposes of relating E.O. 11246 to the Procurement Act. It can be argued that the only authority given the Executive, and therefore O.F.C.C.P., is to disallow all back pay and affected class relief from the cost of doing business with the federal government.

It has been argued that the threat of back pay liability serves a legitimate role in encouraging contractors to pursue their affirmative action obligations conscientiously. Even if this assumption were true for some contractors, which is highly doubtful, mere assertions that such awards may serve an important purpose beyond economy and efficiency are insufficient to satisfy the nexus test. In *Liberty Mutual Insurance Co.* v. *Friedman*, *supra*, the court specifically rejected the argument that a regulation promulgated under an Executive Order that traces its authority to a particular statute need bear no relation to the purposes of that statute so long as the regulation relates to national policies reflected in other sources:

> This would render meaningless the simple fundamental separation of powers requirement recently reasserted by the Supreme Court in *Chrysler*, that such an "exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of (legislative) power by the Congress . . . ," 441 U.S. at 301, and lie "reasonably within the contemplation of that grant of authority." 639 F.2d at 171.

Finally, even if it is assumed that the President has the power to require back pay as a condition of doing business with the government,

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[207] Slominsky and Willacy, "Back Pay and Extra-Judicial Proceedings: Is the Office of Federal Contract Compliance Programs Exceeding Its Authority? 41 Ohio St. L. J. 401, 406 (1980). See also, Note "Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246," 33 Vand. L. Rev. 921, 931 (1980).

[208] Kandel, "OFCCP, Affected Classes, and Back Pay," 5 Employee Rel. L. J. 104, 105 (1979).

that authority was not exercised in Executive Order 11246. As noted earlier § 209 of the Order, entitled "Sanctions and Remedies," specifically delineates the sanctions which the Secretary may impose. Back pay awards are not mentioned in § 209, and no implied authority for the imposition of such remedies can be found elsewhere in the Order.[209] For even if it is assumed that the listing of sanctions and remedies in § 209 is not intended to be exhaustive, back pay awards and other forms of retroactive relief are so different in nature and purpose from any remedy mentioned in E.O. 11246 that authority for their imposition cannot reasonably be inferred in the absence of express language. As noted by the court in *U.S.* v. *Trucking Management, Inc.*,[210] a case in which the plaintiffs sought retroactive seniority relief under E.O. 11246:

> the affirmative action obligations of the Executive Order . . . have only prospective application. These obligations could not be applied here to provide retroactive seniority relief.

4. LEGAL REQUIREMENTS UNDER E.O. 11246 WHICH EXCEED TITLE VII

Title VII of the Civil Rights Act of 1964 was enacted by Congress "to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." [211] According to the Supreme Court, Title VII is intended to "eliminate the discriminatory effects of the past as well as bar discrimination in the future" and provides "the most complete relief possible." [212] The product of extensive Congressional debate, Title VII represents a "special blend of what is necessary, what is fair and what is workable." [213]

The antidiscrimination language of E.O. 11246, as amended, mirrors that of Title VII.[214] Notwithstanding this similarity, and notwithstanding Title VII's status as the nation's principal equal employment law, OFCCP contends that the contractual commitments of federal contractors under the Executive Order exceed the statutory obligations of Title VII. The courts, justifiably, have been critical of this approach. In *United States* v. *East Texas Motor Freight System, Inc.*,[215] the court ruled that since relief under Title VII was intended as the most complete relief possible, "the Executive Order could scarcely be interrupted to demand more."

The "present effects of past discrimination" theory of employment discrimination is no longer cognizable under Title VII, but remains viable under the Executive Order. Under this theory contractors are guilty of unlawful discrimination if they fail to remedy the present effects of discrimination which occurred many years ago, but which has long since ceased. The Supreme Court has determined, however, that under Title VII there is no requirement to remedy the effects of past discrimination if such discrimination was not the subject of a

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[209] See Chamber Memorandum at hearing record 405–411.
[210] 26 FEP Cases 809, 814, fn. 56 (C.A.D.C. 1981).
[211] *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 34 (1977).
[212] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418, 421 (1975)
[213] *Teamsters, supra* at 375, *quoting Lemon* v. *Kurtzman*, 411 U.S. 192, 201 (1973).
[214] Compare paragraph (1) of the equal employment opportunity clause in § 202 of E.D. 11246 with § 703(a) of Title VII.
[215] 564 F.2d 179, 185 (5th Cir. 1977).

timely complaint and if the employer's practices do not presently result in disparate impact.[216] As stated by the Court in *Evans*:[217]

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

In contrast to this practice under Title VII, OFCCP continues to seek relief for alleged discrimination which occurred years ago, even prior to enactment of Title VII. As stated in the OFCCP Compliance Manual:

> An affected class of employees can also exist without a finding of current underrepresentation, adverse impact, or concentration. It is not sufficient for a contractor to merely stop discriminating. It must correct the effects of that discrimination. Otherwise neutral employment procedures can perpetuate prior discrimination against an affected class of covered employees, which was created by systemic discrimination which has since ceased; an appropriate remedy must then be obtained, unless the contractor can show that the policy which perpetuates past discrimination is required by business necessity.[218]

5. STATUS OF BONA FIDE SENIORITY SYSTEMS

OFCCP also has failed to honor the protections afforded by Title VII to seniority systems. Since white males who were hired in the past will always have greater seniority than more recently hired women and minorities, seniority systems tend to perpetuate past discrimination. Section 703(h) of Title VII,[219] however, specifically protects such systems and, thus, reflects Congress' determination that the substantive definition of employment discrimination should exclude the operation of bona fide seniority systems. Several courts, including the Supreme Court, have held that deference should be accorded to bona fide seniority systems in equal employment litigation.[220]

OFCCP has chosen to ignore the accommodation of competing interests embodied by Congress in Section 703(h),[221] and has even gone so far as to suggest that maintenance of such seniority systems constitutes a willful violation of E.O. 11246.[222] To date, OFCCP's position has been rejected by the courts.[223] As succinctly stated by the D.C. Circuit in "Trucking Management," supra OFCCP's position:

> [w]ould require us to conclude that Congress somehow intended to permit the Executive independently to modify or dismantle concededly bona fide seniority

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[216] *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *Delaware State College* v. *Ricks*, 101 S. Ct. 498 (1980); *cf*, *Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977).

[217] *United Air Lines, Inc.* v. *Evans*, *supra* at 558.

[218] U.S. Department of Labor, Office of Federal Contract Compliance Programs, Federal Contract Compliance Manual, § 7–30.5, p. 7–6.

[219] 42 U.S.C. § 2000e–2(h).

[220] *See, International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *California Brewers Association* v. *Bryant*, 444 U.S. 598 (1980), the Fifth Circuit's decision in *United States* v. *East Texas Motor Freight System, Inc.*, 564 F.2d 179 (5th Cir. 1977), and the decision of the Court of Appeals for the District of Columbia in *United States* v. *Trucking Management, Inc.*, F.2d 26 FEP Cases 809 (D.C. Cir. 1981).

[221] See OFCCP Policy Clarification Statement No. 77–42/LEG (July 20, 1977), reprinted in 2 Emp. Prac. Guide (CCH) ¶5031 (1977) ("[o]ur view of the *Teamsters* case is that it is a narrow decision based on the [§ 703(h)] exemption").

[222] Section 1–60.107 of OFCCP's *Compliance Manual*, p. 1–15, defines a "willful violation" as: An act committed by a contractor who could be expected to know its consequences or failure to act when a reasonable person would be expected to understand the result of such failure (*for example, perpetuation of the effects of past discrimination by failure to change a seniority system*) (emphasis added).

[223] *United States* v. *East Texas Motor Freight System*, *supra*; *United States* v. *Trucking Management, Inc.*, *supra*.

systems. We find it highly unlikely that Congress would have impliedly approved Executive interference with the same bona fide seniority systems it had deliberately immunized under section 703(h). (26 FEP Cases at 814–815.)

The legislative history of Title VII indicates that the Congress had acknowledged the Executive Order program and contemplated its continued existence. However, though the Executive Order has the force and effect of law it is not a statute and must be enforced within the framework of Congress' legislative will. United States v. New Orleans Public Service, Inc. (hereinafter "NOPSI"), 533 F.2d 459, 465, 14 FEP Cases 1734 (5th Cir. 1977).

National policy and legislative will are established by Congressional enactments arising from the exclusive lawmaking power which rests in Congress, not the executive branch. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961) ; U.S. const. art. II, § 3. The "Government enjoys the unrestricted power to produce its own supplies to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." Perkins v. Lukens Steel Co., 310 U.S. 113, 127, 1 WH Cases 54. However, the executive branch may not exercise its authority, derived from Congress, in a manner inconsistent with the implied or expressed will of Congress. Youngstown Sheet & Tube Vo. v. Sawyer, 343 U.S. 597, 30 LRRM 2172 (1952) ; Cramer v. Virginia Commonwealth University, 415 F. Supp. 673, 12 FEP Cases 1397 (E.D. Va. 1976.[224]

6. EXPEDITED HEARING PROCEDURES

Section 208(b) of the Executive Order provides, in part: "[N]o order for debarment of any contractor from further Government contracts . . . shall be made without affording the contractor an opportunity for a hearing."

The purpose and meaning of this provision are self-evident—contractors may not be deprived of valuable government contracts without first being afforded a hearing. OFCCP's actual procedures, however, have not always been sufficient to insure that this protection was a practical reality.

Initially, OFCCP used special terms to avoid allegations of failure to provide due process, using the euphemisms of "nonresponsibility" and "passover" for "noncompliance" and "debarment," respectively. Contractors deemed not in compliance with their Executive Order requirements were said to be "nonresponsible" and therefore subject not to contract debarment, but rather to contract "passover." The significance of these distinctions was that under 41 C.F.R. § 60–2.2(b) a contractor can be declared "nonresponsible" and "passed over" for government contracts for which it is otherwise eligible, twice, without a hearing, when "it comes to the contracting officer's attention through sources within his agency or through the OFCCP or other Government agencies," that the contractor is not in compliance with the Executive Order. As interpreted by the agency "a bidder on Government contracts [can] be passed over at least two times for a given deficiency at a particular establishment or facility without a hearing." [225]

Contractors argued that a "passover" under Section 60–2.2(b), because it constitutes an order "to refrain from entering into further contracts," is for all practical purposes indistinguishable from a debarment within the meaning of Section 208(b) and that a prior hearing must therefore be granted. The courts, in a long line of decisions,

[224] Opinion of District Court Chief Judge Bryant in *United States* v. *Trucking Management, Inc.*, 20 FEP Cases 342, 347–348 (D.D.C. 1979).

[225] Affidavit of OFCCP Director Welden Rougeau, June 18, 1977, filed in *Crown Zellerbach Corp.* v. *Marshall*, No. 77–1823 (E.D. La.).

upheld this argument and entered injunctions against contract denials without a prior hearing.[226] As one court stated:

> The Court must look to Section 209(a)(6) to ascertain the meaning of debarment as referred to in Section 208(b). The Court concludes that, when the President used the word "debarment" in Section 208(b), he used it expressly as referring to the action that is contemplated by Section 209(a)(6). The government argues that debarment means the permanent disqualification for contracts manifested by awarding the contracts toa competitor. But Section 209(a)(6) says nothing about any permanent disqualification, nor does it say anything whatever about letting the contract to a competitor. Rather it says that the Secretary or the agency may refrain from entering into any further contracts with the contractor until the contractor complies. That is precisely what has happened in this case, and it is precisely what the Executive Order proscribes the agency from doing without a prior hearing. *Sunstrand Corp.* v. *Marshall, supra,* slip op. at 13.

In view of the overwhelming judicial rejection of OFCCP's contract passover policy, the agency in late 1979 abandoned the policy and replaced it with an expedited hearing procedure which could yield a debarment order in less than 100 days from issuance of a complaint.[227] Although ostensibly designed to afford contractors a hearing complete with the due process safeguards which were absent in the passover procedures, the expedited hearing process, with its rigorous time restrictions and virtually nonexistent discovery privileges, has operated more as a kangaroo court than an impartial judicial tribunal. Several contractors, including Firestone Tire and Rubber Company, Prudential Insurance Company and the University of California at Berkeley, have been subject to the expedited procedures. Invariably, the due process contentions of the contractors have been given short shift in the name of expeditious debarment orders.

Under the expedited procedure the government reserves the right to determine not only when the complaint shall be filed, but whether the expedited procedures will be used.[228] Contractors who fail to file a specific request for a hearing within 20 days of the complaint automatically waive the privilege.[229] In most cases the hearing must be convened within 45 days of the request and completed within 15 days thereafter.[230] Administrative Law Judges are required to render a recommended decision within 15 days of the close of the hearing even if it means doing so without the benefit of either a transcript or post-hearing briefs from the parties.[231] The parties are thereafter given 10 days within which to file exceptions to the ALJ's Decision [232] and the Secre-

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[226] *See, Sunstrand Corp* v. *Marshall,* No. 78C 20007 (N.D. Ill. June 26, 1978); *Pan American World Airways, Inc.* v. *Marshall,* 15 FEP Cases 598 (S.D.N.Y. 1977); *Crown Zellerbach Corp.* v. *Marshall,* No. 77–3036 (5th Cir. Nov. 17, 1977); *Boeing Co.* v. *Marshall,* No. C–78–215M (W.D. Wash. 1978); *General Dynamics Corp.* v. *Marshall,* No. 77–4323–F (D.C. Calif. Nov. 18, 1977); *International Harvester Co.* v. *Marshall,* No IP 77–159–C (S.D. Ind. March 25, 1977), *Conrac Corporation* v. *United States,* No. 77–3153 HP (C.D. Calif. August 24, 1977); *Texaco Inc.* v. *Marshall,* No. B–77–416–CA (E.D. Tex. August 23, 1977); *Illinois Tool Works* v. *Marshall,* No. 77–C–2135 (N.D. Ill. August 5, 1977); *National Bank of Commerce of San Antonio* v. *Marshall,* No. SA 76 CA 379 (W.D. Tex. June 8, 1977); *Lukens Steel Company* v. *Brown,* No. 77–2039 (E.D. Pa. June 10, 1977); *Snider Lumber Products* v. *Marshall,* No. F–78–17 (E.D. Calif. 1978). See also *Crown Zellerbach Corp.* v. *Wirtz,* 281 F. Supp. 337 (D.D.C. 1968). But see *Commercial Envelope Co.* v. *Dunlop,* 11 FEP Cases 117 (S.D.N.Y. June 25, 1975).

[227] See, 44 Fed. Reg. 77003 (1979).

[228] 41 C.F.R. § 60–30.32(a). Although OFCCP has proposed affording contractors the right to challenge use of the expedited procedures before an Administrative Law Judge (see, 46 Fed. Reg. 43006 (1981)), contractors are not entitled to appeal the Judge's determination.

[229] 41 C.F.R. § 60–30.32(c).

[230] 41 C.F.R. § 60–30.32(d).

[231] 41 C.F.R. § 60–30.35.

[232] 41 C.F.R. § 60–30.36.

tary of Labor has an additional 30 days within which to affirm, modify or reverse the ALJ's recommendations.[233]

The expedited hearing procedures amount to little more than a modern-day "trial by ambush." As stated by Ronald M. Green, OFCCP is "investigator, prosecutor, and judge in the administrative proceedings they commence." [234] Although the expedited procedures should be used only for specific, easily identifiable issues, 41 C.F.R. § 60–30.31 lists four instances in which they are presumptively appropriate including whenever the contractor "has not adopted and implemented an acceptable affirmative action program." This language is so broad that any Executive Order deficiency—ranging the entire gamut from minor technical deficiencies to complex affected class litigation—could be processed through the expedited procedures. For all but the most simple of cases, attempting to squeeze litigation into the mandated time frames inevitably results in the sacrifice of due process requirements. This problem was addressed by Mr. John A. Priest, Corporate Manager of Employee Relations of the Boeing Company, who testified that:

> OFCCP's desire for some kind of an additional short cut "expedited hearing" which fails to provide to the accused contractor *all* of the due process protection required under the Administrative Procedures Act, the Federal Rules of Civil Procedure itself, raises a question as to OFCCP's good faith in proposing a procedure which has all of the ear marks of a "kangaroo court."
>
> The problem would be less serious if the proposed "expedited hearing" process were confined to simple factual technical issues such as a contractor's failure to allow an onsite review to be conducted or failure to provide access to records clearly relevant to the contractor's compliance status. However, to apply this short-cut abbreviated hearing process to such key substantive issues as to whether (1) a contractor has violated a conciliation agreement or (2) a contractor has not adopted and implemented an acceptable affirmative action program means that the great majority of enforcement proceedings could be conducted under this provision.
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> Whether or not a contractor has adopted and implemented an acceptable affirmative action program is the real core of the contract compliance effort. It normally involves complicated demographic and statistical issues dependent on complex and intricate mathematical evidence in voluminous quantities, both documentary and in the form of expert statistical witnesses. It is the equivalent in complexity to full-blown class action litigation under Title VII or a suit under the anti-trust laws. Common knowledge teaches us that these cases are seldom completed within a few weeks time. An enforcement process which, except in unusual cases, provides only 65 days for preparation by the accused contractor and 15 days for the hearing itself is hardly adequate for the determination of such complex cases with such serious consequences.[235]

The frustration expressed by the first Administrative Law Judge to preside over an expedited hearing summarizes cogently the practical difficulties with OFCCP's procedures:

> Thus, although no urgent needs had been shown for summary disposition and no reason advanced for preferring this case over numerous prior proceedings in which diverse minorities, females and handicapped persons may be awaiting corrective action for discrimination they have suffered, the ill-conceived and abortive time limitations of the expedited hearing procedure have been scrupulously observed. As a result, and through no fault of the multiple counsel for the respective parties, we have a poorly prepared case, a record that is long on immaterial documents and short on cogent testimony, a diffuse presentation of facts and law, and in all candor, a hasty decision.[236]

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[233] 41 C.F.R. § 60–30.37.
[234] Witness, Ronald M. Green, December 8, 1981.
[235] October 22, 1981, at pp. 438–439.
[236] Judge Robert J. Feldman in *OFCCP* v. *Firestone Tire and Rubber Company, Inc.*, 80–OFCCP—15 slip. op. at 3 (May 29, 1980) quoted by Mr. Priest October 22, 1981 at hearing record 1084–1085.

In addition to authorizing the litigation of complex issues in an inadequate time frame the expedited procedures also deny to contractors the discovery privileges which often are essential to the preparation of a defense. The regulations authorize requests for admissions, the exchange of witness and exhibit lists at least 10 days prior to the hearing, and the limited use of depositions upon authorization of the ALJ "for good cause shown." [237] Interrogatories and other pre-hearing discovery privileges available under OFCCP's usual hearing procedures [238] may not be used by contractors in expedited proceedings.

As noted, OFCCP retains exclusive control over (1) the timing of the complaint, and (2) whether the complaint shall be processed in accordance with the expedited or the normal procedures. The agency thus can delay commencing suit until such time as its case is fully prepared, and then severely curtail the contractor's ability to defend itself by requesting expeditious processing. In addition OFCCP does not have the same need for discovery as do contractors. By the time a complaint is filed OFCCP will already have collected all disclosable information during the earlier compliance review or complaint investigation. Contractors, on the other hand, must rely exclusively upon discovery privileges to acquire relevant OFCCP documentation. The extent to which this process deprives contractors of the ability to defend themselves adequately was summarized in a statement filed by the Chamber of Commerce:

> OFCCP's expedited procedure provides limited discovery rights. Interrogatories, for example, are not permitted. This presents no serious problem for OFCCP because it doesn't need discovery after a complaint is filed. It has the self-declared right to gather all the information it needs during investigation. If the agency decides it doesn't have enough information when a complaint is filed, it won't use the expedited procedure. On the other hand, limited discovery is very prejudicial to an employer trying to defend himself. Unlike OFCCP, the employer is not permitted to discover the government's position during investigation. The employer has no say in whether the expedited procedure will be invoked. He has very little opportunity to discover what the government's claims against him are. This unfairness is compounded by the fact that OFCCP's regulations provide for "notice" pleading in the complaint, although it is not required in its complaint to state the facts that underlie its claims. But a contractor's answer must "contain a statement of the facts which constitute the grounds for defense." To make things even harder on the contractor, once OFCCP has completed its investigation at its own pace, this expedited proceeding is to be rushed to decision within 70 days after issuance of the complaint. In effect, the only thing "expedited" is the contractor's defense. Once a contractor has been hauled through OFCCP's administrative guantlet, he has no further chance for a real day in court. He can appeal, but he will get only a review of the lopsided record established before OFCCP, not a denovo hearing. He never gets a fair chance to establish a record.[239]

D. SUMMARY OF FINDINGS AND CONCLUSIONS

Five days of hearings and numerous letters and comments provided ample evidence that the Office of Federal Contract Compliance Programs is an embarrassment, a disheartening example of a federal bureaucracy that has lost sight of its unique and important mission. Many of its regulations are poorly conceived, wasteful, unnecessarily rigid and even illegal. The administration of the agency has been

[237] 41 C.F.R. § 30.33.
[238] See 41 C.F.R. §§ 60–30.8 through 60–30.13.
[239] Statement of Robert T. Thompson, October 22, 1981, pp. 389–390.

uniformly poor; its staff was shown to be unprofessional, poorly trained and frequently beligerent. OFCCP's record of enforcing Executive Order 11246 is comparable to a rudderless ship: unpredictable, erratic and thoroughly susceptible to the political attitudes and presumptions of those responsible for its direction.

Four Administrations have tried and failed to apply even a semblance of order to the OFCCP bureaucracy. The agency's foot soldiers, the Employment Opportunity Specialists (EOS), are uniquely free to use any tactics they choose as they engage in what has become warfare between federal contractors and the federal government. Over the years, the desire on the part of these officials to promote what they perceive as advantageous social change through the administrative process has utterly blinded them to the legal limitations of federal regulation. Federal contractors often are unable to distinguish between permissible and impermissible conduct because so few of OFCCP's requirements are based upon law or logic. And the biggest losers in this battle, as is always the case when one side is represented by beligerent bureaucrats, are the minorities and women who are supposed to benefit from the program. Today, OFCCP's regulations cost more than $1 billion dollars each year, yet its officials have never been able to provide any concrete evidence of whether their requirements are increasing the number of employment opportunities for minorities, women, and the handicapped.[240]

The following summary highlights the principal findings from the hearings and identifies the key issues which must be addressed if this program is to be amended correctly and revised thoroughly.

1. THE NEED FOR AN AGENCY SUCH AS OFCCP

Almost every witness felt that the concept behind OFCCP's formation, i.e., the need for a federal program to insure that federal contractors maintain nondiscriminatory employment practices, was a worthwhile federal activity and should be retained. Concern lay more with the existing mechanism for insuring this obligation not with the obligation itself. For example, Jose Cano testified: [241]

> We in the Hispanic community understand the intent of the Executive order to have been a good one—basically, to create a means of insuring the increased hiring of qualified Hispanic and other minority Americans throughout all levels of the American work force. Yet unfortunately this has not been the effect that Executive Order 11246 has had.
>
> * * * * * * *
>
> We in the American GI Forum in particular are convinced that a redirection of emphasis and approach is necessary to guide the program to its originally intended ends—the bottom line, as we call it—of increasing and enhancing minority and female representation in the work force.

Similarly, Barry Goldstein representing the NAACP commented: [242]

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[240] It should be noted that OFCCP does have many employees who are fair, logical and committed to the objectives of E.O. 11246. Several have sent letters to the Senate Labor Committee complaining of the current abuses and urging that immediate reform be instituted. Unfortunately, they are a minority and too often unrepresented at the levels responsible for the development of policy.

[241] Hearing record, July 29, 1981, pp. 62, 63.

[242] Witness, Barry Goldstein, December 8, 1981.

What we need to do is to encourage voluntary compliance, and voluntary compliance through, . . . supervision . . . also to make voluntary compliance and realistic change possible . . .

James Graham, Chairman of the EEO Policy Committee of the Business Roundtable, echoed other employer organizations when he stated: [243]

The essential message in these comments is that the program should be reoriented, so that OFCCP's effectiveness is ultimately demonstrated by increased numbers of minorities and women hired, trained, and promoted as a result of contractors' good faith efforts rather than by penalties demanded and contractors debarred.

In sum, there seemed to be a genuine commitment to and interest in the objectives of the Executive Order program on the part of both civil rights advocates and employer representatives. Perhaps most striking was the support from the employer community for a variety of types of affirmative action including the use of goals and timetables.[244] It should be noted, however, that those who support the Executive Order program do not necessarily agree as to its overall purpose. As noted earlier, there is a difference of opinion as to whether Executive Order 11246 guarantees equality of opportunity or actual parity in employment.

2. ENFORCEMENT TECHNIQUES

The agency's enforcement techniques seem designed to antagonize and frustrate contractors rather than to encourage and generate cooperation and participation. Little attention is given to the ramifications of the demands placed upon contractors, and requirements affecting entire corporations often are changed or amended at the whim of a single government employee.

3. PAPERWORK REQUIREMENTS

Agency officials often take an insensitive and capricious approach towards placing demands upon contractors. Requirements are frequently changed, and submissions by contractors often have been lost. It is clear that during compliance reviews, many agency officials never question the cost to the contractor of the government's data requests or determine the relevancy of the data prior to its submission. Nor is it valid to state that a contractor can always protest any unnecessary demand. Small contractors cannot afford to risk losing their contracts. Moreover, most often the official making paperwork demands is the same person that is required to determine whether the contractor is in compliance and qualifies for or can remain a federal contractor.

4. SELECTING CONTRACTORS FOR REVIEW

The selection process adopted by OFCCP in no way encourages cooperation with OFCCP's requirements. Contractors found in compliance are just as susceptible to review as those who have shirked their

[243] Witness, James Graham, December 10, 1981.
[244] Only one business representative, Robert T. Thompson, Regional Vice Chairman of the United States Chamber of Commerce, advocated abolishing the OFCCP. See October 22, 1981, at p. 378.

obligations. Apparently, OFCCP has yet to employ a mechanism for selecting contractors on a "worst first" basis.

5. COMPLIANCE STANDARDS

OFCCP'S regulations are so poorly conceived and inflexible that they seem to encourage arbitrariness and capriciousness on the part of the agency officials. Most questions concerning compliance are resolved not by a determination of the contractor's good faith efforts but by a simply unbelievable package of confusing tangles and unnecessary regulatory requirements. When viewed in their totality, OFCCP's regulatory standards resemble the complexity and absurdity of one of Rube Goldberg's inventions without any of the inherent capability to make something happen found in that genius' creations. The provisions governing availability, utilization, job groups and monthly manpower utilization reports must be changed.

6. GOALS AND TIMETABLES

The testimony indicated that goals are perhaps the most valuable means for measuring progress and are not uncommon to the management techniques used by businesses and industries. The debate over goals and timetables is more directly attributable to those OFCCP's regulations which require contractors to treat the goals as if they were quotas. Moreover, the current use of goals does not directly benefit those who lack the requisite skill and experience to be considered qualified for a job opening, and they may have an adverse impact on professional minorities and women attempting to enter the market place.

7. COVERAGE

It is apparent from OFCCP's policies concerning coverage that it has lost sight of the fact that E.O. 11246 establishes the federal contract compliance program. The legal foundation for the program is contractual, not statutory. OFCCP's authority over a particular contractor as well as the contractor's EEO obligations derive from, and are defined by, a contract. Indeed, the philosophical underpinning of the Executive Order is that employment opportunities generated by government contracts shall be available to all persons on an equal basis. It is for this reason that EEO clauses contained in nonexempt contracts are designed to define the employment conditions under which those contracts are to be performed. They are not intended to be used as jurisdictional predicates for OFCCP regulation of non-federally-related employment.[245] By contending that E.O. 11246 encompasses facilities, subsidiaries and construction projects which are neither federal nor federally-assisted, OFCCP has extended the reach of the Executive Order far beyond its contractual limits, and has sought to regulate facilities over which it has no legitimate legal claim to jurisdiction.

[245] See discussion of *Liberty Mutual Insurance Company* v. *Friedman*, supra, and *OFCCP* v. *Western Electric Company*, 80–OFCCP–29 (U.S. Dept. of Labor) in which an Administrative Law Judge concluded that § 503 of the Rehabilitation Act of 1973, another statute administered by OFCCP, does not apply to the entire workforce of a federal contractor, but is limited in coverage to those employees doing federal contract work.

8. DUPLICATION BETWEEN OFCCP AND EEOC

The hearings demonstrated quite clearly an OFCCP penchant for maintaining and extending its own influence.[246] By focusing primarily on relief for victims rather than on affirmative action, and by regulating the employment practices of facilities and subcontractors having little if any direct relationship with federal procurement, OFCCP has expanded its jurisdiction far beyond anything reasonably contemplated or legally required by E.O. 11246. With available resources already heavily taxed and with budget cuts necessitating even further economies in the future, it is appropriate to evaluate whether the American people currently are realizing the greatest return on their civil rights investment. Clearly the answer is that they are not.

It makes little practical sense for two federal agencies to seek relief for past discrimination and there may be strong policy reasons for having distinct roles for EEOC and OFCCP. As Mr. Nixon of ITT stated:

> I think there is a distinct and separate need for each agency. . . . I think Title VII is aimed at identifying discriminatory practices and discrimination as it is practiced against individuals that is illegal. It deals with righting that.
>
> However, I think as Title VII is structured, or certainly as I understand it, it does not actually aim at the sort of thing that affirmative action under 11246 was designed to get at. That is, to look forward and ask where are we, whether or not we have been discriminating to have brought us to where we are, look forward to where we think we should be with respect to the employment of people of different races, sex, and so forth, then devise for each contractor, each facility, a specific program to move from where we are to where we feel we should go. That, to me, is very distinctly different than what is mandated under Title VII.[247]

9. BACK PAY AND OTHER RETROSPECTIVE RELIEF

There also are persuasive policy and legal reasons why back pay and other forms of relief for victims of past discrimination are inappropriate remedies for noncompliance with E.O. 11246 requirements. From the standpoint of policy, perhaps no single feature of the current administration of the Executive Order has caused greater resistance among contractors than has the OFCCP's belated attempt to feature back pay awards as a routine aspect of its monitoring of the contract compliance program. While the emphasis in an AAP is on progress brought about through forward-looking programs, compliance reviews have typically paid minimal attention to AAP achievements and have instead focused on detecting alleged "affected classes" of discriminatees on whose behalf back pay in very large sums is almost invariably demanded.

The genius of the Executive Order program was its enlistment of employers in expensive and ambitious remedial programs in a no-fault context. Affirmative action is undertaken for the greater good of American society, not because contractors must expiate individual guilt. The great benefit of the program for minorities and women is in its

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[246] Mr. Green in his testimony indicated that Section 718 of Title VII constitutes "a limitation on OFCCP's authority to harass contractors with multifacility establishments by repeated and vexatious compliance reviews." See testimony December 8, 1981, p. 23. Section 718 provides that a hearing must be held before federal contracts can be interrupted at a facility with an AAP which has been approved within the previous 12 months. As discussed below, OFCCP has abandoned its former policy of passing contractors over for contracts without a hearing. In any event, the hearing requirement of § 718 does not preclude OFCCP from conducting multiple reviews of a facility within a single year, nor from harassing a contractor during a review by making exorbitant demands, taking inconsistent positions or similar tactics.

[247] Hearing record, July 30, 1981, p. 334.

expansion of job opportunities, its encouragement of affirmative action consciousness on the part of employers and its positive, forward approach. The dollars gained from back pay awards are not of great significance overall for minorities and women: they come in the nature of a windfall, and produce no significant long-range benefit. Accusations, recriminations and the stigma of being accused of discriminating poison the cooperative, forward-looking climate fostered by the unique attributes of the Executive Order program. Back pay does not assist OFCCP in enforcing the program; it incites contractor resistance, invites OFCCP abuse and distracts the agency from performing its special mission. Accordingly, OFCCP's authority should be made prospective, limited to ensuring that government contractors are undertaking affirmative efforts to enhance the employment opportunities of women and minorities. The agency simply would not be involved in the investigation, prosecution, settlement or adjudication of discrimination claims—they would instead be left to EEOC and private litigants under Title VII and other statutes.

In addition, it is clear that Congress never endorsed a back pay policy for OFCCP in conjunction with its consideration of Title VII or its 1972 amendments. Such a remedy would have been contrary to the prospective nature of the program as recognized by Congress. Moreover, the unrestricted authority claimed by the OFCCP to award retrospective remedies is of the same nature as that which Congress denied to the EEOC.

Similarly, OFCCP's asserted right to assess back pay awards against government contractors finds no roots in the authority granted by the federal procurement statute to provide an economical and efficient system of government procurement. And, finally, back pay and other forms of retroactive relief bear no reasonable relationship to the covenant to take prospective affirmative action and thus are unrelated to the purpose of the contractual affirmative action obligation.

10. TITLE VII AND THE EXECUTIVE ORDER

OFCCP's policies expose federal contractors to substantial monetary liability based upon claims which are not recognizable under Title VII—claims which are stale and for which evidence and witnesses may long since have disappeared.

Discrimination under the Executive Order should be coextensive with its meaning under Title VII, and OFCCP should be precluded from declaring unlawful under the Order any conduct which is lawful under Title VII. Not only does this position constitute sound policy, it is required by law.

11. EXPEDITED HEARING PROCEDURES

OFCCP's expedited hearing procedures do little more than pay lip service to the Executive Order's requirement that a hearing precede contract debarment. While perhaps not constituting as blatant a denial of due process as the earlier "passover" policy which denied any hearing at all, the expedited procedures offer contractors the form of a hearing while simultaneously denying the privileges and safeguards necessary to ensure that the allegations are tried in accordance with the requirements of due process of law.

IV. PROPOSED CHANGES IN THE ADMINISTRATION OF OFCCP AND THE IMPLEMENTATION OF EXECUTIVE ORDER 11246

Many of the witnesses did not limit their testimony to complaints about the current program but proffered both general and detailed recommendation for improving OFCCP's regulatory approach. Taken together, the comments can be divided into two categories: general principles upon which any regulation of federal contractor commitment to equal employment opportunity should be based and specific regulatory recommendations to improve the agency's administration of the Executive Order program.

A. General Regulatory Principles

1. THE NEED FOR OFCCP

The hearings made it clear that there are strong policy reasons for an Executive Order program, as long as it does not duplicate other federal activities or discourages participation. Steps other than just breaking down barriers to discrimination must be taken in order to establish true equality of employment opportunity.

2. MEASURING OPPORTUNITIES NOT PROCEDURES.

Several witnesses were concerned that OFCCP was more concerned with compliance with procedure than with generation of opportunity. Its officials must sincerely believe that rigid adherence with OFCCP's paperwork requirements is the only necessary federal action to stimulate minority and female advancement. Innovation and risk taking is thoroughly discouraged. As Mr. Cano concluded,[248]

> Rather than focusing on the actual progress of firms in their hiring of minorities and women the current program emphasizes compliance procedures which serve mainly to lock firms into an entangling bureaucratic reporting process.
>
> The result is, first, that the extensive procedures required cause covered employers to devote a majority of time complying with procedure rather than engaging in meaningful efforts to increase minority and female representation within the work force.
>
> Second, and more fundamentally, the process builds in employer opposition to the program.

The Equal Employment Advisory Council expanded upon this concept and suggested [249]

> Meeting goals should not be the sole criterion for determining compliance. It should be the contractor's overall good faith efforts to achieve equal employment opportunity. This principle already appears in the regulations, but it should be strengthened as past practice has been to stress goal achievement at the expense of virtually everything else. Moreover, the stress should be upon

[248] Hearing record, July 29, 1981, at p. 62. See also July 29, 1981, at p. 76; July 30, 1981, at p. 76; October 22, 1981, at p. 445.
[249] Statement, EEAC Dec. 10, 1981.

constructive advice and assistance from OFCCP, rather than the present confrontational, prosecutorial approach. The object should be to help a contractor find effective ways of enhancing minority and female opportunities, not to cast blame and demand penalties. More recognition should be given to the contractor's special efforts to foster the upward mobility of minorities and women. These can be as broad ranging as support of national efforts, such as the National Action Council for Minorities in Engineering, or as local as activities such as Youth Motivation Task Forces. Recognition of this type of activity will promote job opportunities, the true measure of affirmative action.

3. ENCOURAGING VOLUNTARY PROGRAMS

As EEAC noted, the punitive orientation to OFCCP's current regulatory approach does little to foster commitment to affirmative action. Participation in the program should be encouraged not punished, especially where the regulated so vastly outnumber the regulators. As one witness testified,[250]

> In fact, on the whole, employers that actually improve the representation of minorities and women within their work force and throughout their personnel actions are no less subject to the Office of Federal Contract Compliance Programs' voluminous documentation requirements consisting of complex analysis of applicant flow, progression line charts, progression sequences and availability, among other things.
>
> This is particularly difficult to justify where oftentimes such employers are cited for technical deficiencies such as posters, EEO statements, et cetera, causing the employer to be placed under a letter of commitment or some other requirement imposing additional paperwork on the employer.
>
> Not surprisingly, these types of procedures break down the incentive for the employer to continue efforts that have resulted in the adequate representation of minorities and women in their work force.

Dr. Osterman concurred, stating [251]

> [t]here are ways in which the adversarial relationship between OFCCP and firms can be reduced. For example, it might be possible to consider a scheme in which firms with particularly good records over a few years are exempt from annual reporting requirements, but that should be treated as a reward for good performance and firms of course should never be permanently exempted.

There has always been some reluctance to address this principle out of concern that employers would be rewarded for complying with the law, for doing what they are already required to do. Such concerns misjudge, however, the nature of OFCCP's regulatory approach. Those testifying seemed more concerned that contractors who are successful in their affirmative action efforts or who are providing significant opportunities for minorities and women should not be exempted from the program's requirements but should be freed from the endless barrage of OFCCP demands. Compliance need not be rewarded but it should not be punished, as is currently the practice at OFCCP.

4. ALLOWING FOR SOME VARIATION IN FORMAT REQUIREMENTS

Several witnesses also suggested that OFCCP should be more flexible in its approach to reviewing the affirmative action program format used by contractors. It would seem that the results of affirmative action efforts should be of greater concern than the location of posters or the formation of job groups. Patrick Estes, Manager of EEO programs

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[250] Hearing record, July 29, 1981, p. 63. See also on the same day, p. 76; October 22, 1981, p. 445; Carmen Estrada, Dec. 10, 1981.

[251] Witness, Paul Osterman, Dec. 10, 1981.

for Dow Chemical Company, is one of thousands of corporate officials who work daily with OFCCP's requirements. His experience and following remarks typify the feelings of the practitioners of affirmative action: [252]

> We have really lost the substance of the program in the shuffle of that paper. As pointed out previously, the percentage of women and minorities in the Dow workforce has continued to increase steadily since the affirmative action program was introduced in 1964. Significantly, OFCCP's pervasive involvement in Dow's employment practices over the past few years has not affected this rate of increase. It is Dow's firm opinion that its internal commitment causes this progress, not Government regulation and agencies.
>
> Dow's affirmative action program is and will continue to be an integral part of its management planning and policies. This assures that minorities, women, handicapped, and others with the qualifications required by Dow will continue to be hired and promoted as their performance and experience dictate.
>
> Based on our disappointing and frustrating experiences, Dow recommends that Government guidelines for affirmative action allow the development of plans to fit the needs and policies of individual companies. The format of the plan is not important and should not be a factor in audits. The emphasis must instead be on progress in the utilization of minorities, women, and other protected groups.

Incorporation of a degree of flexibility into the program would also free up resources that could be spent on training or other productive activities instead on satisfying needless requirements. As Ms. Fishbein stated: [253]

> I am confident of my ability to judge that the artificialities and the contrived mechanisms of the OFCCP regulations have not accelerated progress toward a more just society or contributed in any meaningful way to equal employment opportunity in our colleges and universities. If anything, they have seriously diverted higher education's energy and limited resources away from the real job to justifying the existence of yet another bureaucratic enterprise.

5. CORRELATION BETWEEN SIZE OF THE CONTRACTOR AND THE EXTENT OF REGULATION

The hearings highlighted the disproportionate burden facing small contractors or small facilities who are subject to OFCCP's requirements. Many of these employers simply do not have the personnel to waste on complying with many of OFCPP's frivolous requirements. Several witnesses suggested that small employers be excluded from the scope of the order.[254] Others urged that small contractors be included within OFCCP's jurisdiction but relieved from some of the paperwork requirements associated with written affirmative action programs. Still others believed that all contractors should be relieved of the perfunctory and unnecessary regulations.[255]

This issue has taken on the added twist of being labeled a big employer-small employer squabble, with the former afraid that the latter would be exempted from the program, thus shifting the burden of regulation exclusively unto large employers. Much of this debate seems to miss the critical issue—all contractors should be relieved of unnecessary burden and all contractors, regardless of size, should share the same obligation. What should be decided is if there is a means for making the regulation of this obligation proportionate to the size of the employer or to the size of the facility under question.

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[252] Hearing record, July 30, 1981, p. 282.
[253] Hearing record, July 30, 1981, p. 276.
[254] See hearing record *e.g.*, July 29, 1981, p. 109; October 22, 1981, p. 101.
[255] Statement, EEAC, Dec. 10, 1981.

6. AWARENESS OF THE COST OF REGULATORY DEMANDS

The arrogance of agency officials may be an unfortunate consequence of such a program, but there is no reason that employers must pay the expense of this attitude. Almost every witness referred to the waste of OFCCP's requirements, a waste which was compounded by a bureaucratic insensitivity to the economic burden of agency requirements. The collective sentiment of the witnesses clearly seemed to suggest OFCCP must become more aware of the cost of its regulations, and should ascertain whether its requests during a compliance review are increasing minority and female employment opportunities in some proportion to the cost of contractors to comply with these requests.

7. EMPHASIZING TRAINING OR OTHER ACTIVITIES WHICH INCREASE THE SIZE OF THE AVAILABILITY POOL

Oddly, the current program provides little incentive or acknowledgment of training activities, probably the only effective means for expanding the job mobility capabilities of minorities and women. The need for training and the existing problems associated with it were accurately summarized by Ms. Maria Rouco, Director of the Cuban National Planning Council, who testified: [256]

> Recent studies show that 85 percent of the Nation's employment opportunities are created and maintained by its 7 million private sector employers. Furthermore, although job growth exists within the large corporations, a study by the National Commission for Employment Policy demonstrated that between 1969 and 1976, small, young firms with less than 20 employees created 66 percent of all new jobs during that 7-year period. More recent studies have confirmed the same.
>
> Additionally, data compiled by the U.S. Department of Commerce that smaller firms have been growing in employment at a rate of 40 percent annually, about 13 times faster than older, larger firms. The growth and promotion of small businesses cannot be overemphasized, as it is important to remember that small firms provide more than 80 percent of the jobs for youth, minorities, and other disadvantaged people.
>
> My experience with the private sector has shown that employers are highly receptive to ideas and innovative programs designed to train individuals for their employment opportunities. Likewise, employers have been receptive to the notion of increasing employment opportunities. Yet when one considers tthe added costs associated with training essentially unskilled individuals, one can understand how a cost-conscious private sector might choose the alternative of training individuals who are not altogether unskilled and thus, on a per capita basis, less costly to train. Therefore it becomes necessary to find ways to reduce that cost in order to create more jobs and develop the employability of each individual.
>
> The private sector, by its very nature, is in business for business' and profits' sake. On this premise it will not, at its own expense, totally incur the added expense of training the unskilled and the structurally unemployed who in most cases are minorities.

It was also suggested that OFCCP could help to stimulate such training. Perhaps the most thorough recommendation concerning training was submitted by EEAC,[257]

> The purpose of affirmative action is to increase the pool of qualified minorities and women. The existing program fails to address this issue directly, concentrating instead on the formalities of compliance. The following four recommendations are based on the presumption that it is better to spend the money now absorbed by compliance with OFCCP regulations (over $1 billion each year by em-

[256] Witness, Maria Rouco, Dec. 10, 1981.
[257] Statement, EEAC, Dec. 10, 1981.

ployers) on activities which either can make minorities and women qualified candidates or make openings available to them.

1. Special, Voluntary Contractor Training Programs

Private contractors, who have the best information on job openings and promotion opportunities within their own workforce, could develop their own voluntary special training programs for the economically and educationally disadvantaged, capable of providing attendees with the necessary skills to be qualified for these openings. One indicia of disadvantage could be long-term unemployment. The programs could be established on a facility or other corporate division basis, and should be designed to utilize the contractor's specific capabilities to maximize minority and female employment opportunities. For example, they may be directed at jobs for which there are openings or in which minorities and women traditionally have been underrepresented. Moreover, they would not have to be limited to entry level positions but could also provide the training necessary to qualify current employees for promotion. While the extent of such programs would have to be negotiated with OFCCP, their content would be left to the contractor without agency regulation or review. The only standard of acceptability would be that the contractor would have to exert good faith efforts to insure that the program would accept minorities and women at a rate commensurate with their representation in the relevant labor market and that it would hire and, for current employees, promote these graduates at a similar rate. The contractor would have the burden of explaining any failure to satisfy these obligations.

By engaging in such a program a contractor would be exempted from compliance reviews for a three-year period. However, a review could be stimulated by meritorious complaints of noncompliance, *i.e.*, complaints which demonstrate on their face or through supporting affidavits that immediate and irreparable injury, loss, or damage will occur if the complaint is not processed immediately. Whether to participate in such programs would, of course, be the choice of the contractor.

2. Community Apprenticeship and Training Programs

Given current economic conditions, many federal contractors will be unable, in the near future, to hire additional individuals, regardless of their training. Nonetheless, these companies often already have developed corporate training programs or skill enhancement classes for their own employees. To utilize this existing resource, a contractor would receive an exemption if it provided to the general public apprenticeship and training programs involving skills for which there are job opportunities in the contractor's community. Such programs would either be gratuitous or require a minimal registration fee paid by the attendee. Commitment to the program may be stronger if there is some cost to individual attendees who have the ability to pay.

Factors to be considered in establishing such a program would include (1) job opportunities and employment needs in the community; (2) community unemployment levels; and (3) the lack of alternative and comparable training institutions. The program should accept attendees at a rate commensurate with their representation in the community.

By engaging in this program, the contractor or facility involved would be exempted from compliance reviews for a three-year period. However, a review could be stimulated by meritorious complaints of noncompliance, *i.e.*, complaints which demonstrate on their face or through supporting affidavits that immediate and irreparable injury, loss or damage will occur if the complaint is not processed immediately.

3. Urban Enterprise Zones

Contractors which open a new facility in an Urban Enterprise Zone would receive an exemption from compliance reviews for such a facility for a period of five years. To satisfy this exemption, the new facility would have to meet any statutory requirements governing corporate facilities in Urban Zones.

4. Activities Not Related to Representation

Not all of the affirmative action activities which a contractor can engage in will have a direct, tangible impact on minority and female representation within its workforce. Programs designed to benefit community employment levels, teach the

structurally unemployed, or assist existing employees in their development toward future promotion are but a few of the activities which cannot be readily measured by simply focusing on a contractor's employment levels, yet they are significant positive steps toward the overall goal of the contract compliance program. OFCCP should encourage these efforts and not simply dismiss them because they do not readily fit within its current regulatory structure.

8. A NEW EXECUTIVE ORDER

Several witnesses also suggested that a new Executive Order should be issued which would incorporate the principles outlined above.[258] The advantages to such a step were described as being twofold. First, a new Order could resolve much of the legal debate over the scope and limitations of Executive Order 11246. There has been frequent discussion of what that Order was meant to accomplish, although a literal reading of its provisions certainly would not countenance the current regulatory programs administered by OFCCP. Issuance of a new Order would enable this Administration to expressly delineate the objectives, scope and requirements of the federal contract compliance program. Moreover, it would enable the Department of Labor to improve OFCCP's activities, without fear of court suits by those who wish to perpetuate the mistakes of the past.

Second, issuance of a new Executive Order would enable OFCCP to be redesigned in accordance with the needs of the 1980's and not the presumptions of the 1960's. It would allow for the requirements put on government contractors to be placed on a positive footing. And perhaps most importantly, it would provide a means for taking advantage of the experience of the last decade of regulation. Specific duties can be outlined, certain actions prohibited, and permissible remedies expressly listed.

B. Specific Regulatory Recommendations

Most of the witnesses also provided specific suggestions for improving OFCCP. Many of these address the problems generated by individual regulations and most presume that some semblance of the existing regulatory structure would be retained.

1. BETTER SELECTION OF CONTRACTORS FOR REVIEW

Clearly, the agency needs to develop a more professional, ethical and effective method for targeting contractors for review. Those contractors who are improving their representation of minorities and women should not be reviewed simply because they are large or, as is apparently true in some instances, their location is close to one of the agency's offices. Moreover, contractors should be given some breathing period between reviews. Similarly, priority should be given to contractor facilities that actually possess federal contracts.[259]

Several witnesses urged that contractors should be targeted on a "worst-first" basis, that those employers who have done the least should be reviewed more often than those in compliance. To be equitable, however, such a standard would need to take into account rates of change. A contractor who is currently in compliance but previously

[258] Witnesses, Robert Thompson, Oct. 22, 1981; James Graham, Lawrence Lorber, Dec. 10, 1981.

[259] See, e.g., hearing record, July 29, 1981, at p. 63.

had a bad record or has few new opportunities cannot be expected to correct deficiencies instantaneously.

2. USE OF SEQUENTIAL AUDITING TECHNIQUES

A commonly referred to recommendation was the suggestion that OFCCP adopt some mechanism for sequential audits. In other words, data requests could be modeled after Internal Revenue Service tax audits, where minimal information is required initially and additional data pertaining to identifiable problem areas is requested sequentially as the need for it arises.[260]

3. INSTITUTION OF FAIR JURISDICTIONAL THRESHOLDS

One of the most hotly debated issues concerning OFCCP involves the agency's jurisdictional thresholds. It was suggested that from a policy standpoint, the Executive Order objectives are best served if it is an inclusive not exclusive program. The overall benefit of the program is its general effect of making large numbers of employers "affirmative action conscious." In itself, this is neither burdensome nor undesirable, but current regulations place burdensome and unnecessary requirements on all contractors. The solution, however, may not be to exempt smaller employers from Executive order coverage but to meet their objections by making the requirements more rational and less burdensome by varying recordkeeping requirements according to contractor size. This would insure that small contractors or small facilities of large contractors are not unduly burdened.[261]

There also are serious questions given OFCCP's limited resources as to whether facilities or sites of federal contractors which do not have federal contracts should be subject to the Order. On one side, it has been argued that if a company is a federal contractor, it should not have one set of employment policies for those facilities that possess federal contractors and another set for those which do not. Such fine delineation may undercut the importance of the program, and may lead to what is called "bicycle compliance," where minorities and women are shuttled around depending upon which facility is being reviewed. On the other hand, it is rather ridiculous for OFCCP to be reviewing facilities that do no governmental business when they do not have sufficient resources to monitor those that do.

One witness suggested a three-tier standard for construction contractors that could serve as model for supply and service employers as well. It was as follows:[262]

> *Level I.*—$500,000 total annual volume of business (over three years) and $100,000 in federal contract. If both of these are met, contractor must: Sign an affirmative action clause.
>
> *Level II.*—$500,000–$5 million total annual volume of business (over three years) and $100,000–$1 million in federal contract. If both of these are met, contractor must: Sign affirmative action

[260] Witness, James Graham, Dec. 10, 1981.
[261] Statement, EEAC, Dec. 10, 1981.
[262] Hearing record,October 22, 1981, at p. 539.

clause; make "good faith" effort to meet goals; file EEO–1 report; and if goals are not met, file narrative report.

Level III.—$5 million total annual volume of business (over three years) and $1 million in Federal contract. If both of these are met, contractor must: Sign affirmative action clause; make "good faith" effort to meet goals; and file Form 257 utilization report quarterly.

4. INCORPORATION OF FLEXIBLE STANDARD OF MEASUREMENT

Many witnesses urged adoption of more flexible standards for measuring compliance. Given the questionable accuracy of the components used to measure compliance, some range of acceptability should be incorporated into the program. The Department of Labor itself has recognized this need and has proposed adopting an 80 percent range of acceptability. While this proposal is an interesting first step, it would not benefit small contractors or small facilities, because its value is directly tied to the size of the job group and the availability figure. For small job groups with low availability, the 80 percent range would still give rise to a possibility of a contractor being required to set a goal for fractional persons. One recommendation called for underutilization being found only where the 80 percent range of acceptability has not been met and the contractor is at least one full person away from being fully utilized in that job group.

5. GOALS SHOULD REFLECT "CURRENT AVAILABILITY" NOT "ULTIMATE AVAILABILITY"

There also seemed to be much agreement that OFCCP should stop using goals which reflect levels that its officials feel availability should be at as opposed to what availability actually is. In other words, goals would be set annually at a rate not less than current availability (i.e., the number or percentage of minorities and women in the relevant labor market who possess the skills and interest to perform the job in question).[263] Moreover, there would be no requirement to establish timetables in which goals must be achieved nor for ultimate goals. As under the existing Order, where a contractor has established goals and has been unable to achieve them, it would be provided an opportunity to demonstrate that a good faith effort to meet them had been made.[264]

6. MORE THOROUGH TRAINING OF OFCCP PERSONNEL

A few witnesses suggested that agency personnel should be better trained in their regulations, both on a legal and regulatory basis. As one former compliance officer has noted, for years OFCCP hired people who were more "committed than competent." A better trained staff should be more capable of spending OFCCP's limited resolutions expeditiously, and a more thorough familiarity with OFCCP's regulations should reduce some of the friction that currently arises from faulty interpretation of OFCCP's own procedures.

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[263] See, *e.g.*, hearing record, October 22, 1981, at p. 541.
[264] Witness, David Copus, Dec. 8, 1981.

Two witnesses also suggested that OFCCP personnel should have a better understanding of the industries they regulate. A reasonable, practical approach to determining availability or setting goals can not be achieved if the Employment Opportunity Specialist is working in a vacuum, with a knowledge of a job's requirement stemming only from a written explanation.[265] Similarly, agency personnel who are recommending that contractors contact various groups for job referrals should have a better understanding of the capabilities of these groups.

7. THE ORDER'S SANCTIONS SHOULD BE INSTITUTED FOR SUBSTANTIVE VIOLATIONS NOT PROCEDURAL DISPUTES

Another frequent proposal was that OFCCP should not introduce sanction proceedings against contractors where the only issue in dispute is some formality of compliance, some mechanical problem as opposed to a substantive violation. It would seem that many of the problems behind this proposal stem from the rigidity of OFCCP's compliance standards. A greater emphasis on results or demonstrable affirmative acts would do much to lessen the possibility the contractors will be cited for unimportant issues, such as location of posters or format of written affirmative action programs.[266]

8. BETTER PROTECTION OF CONFIDENTIALITY DATA SUBMITTED TO OFCCP

It was also proposed that OFCPP correct its policy governing the confidentiality of data submitted by contractors during compliance reviews.[268] The agency's current practice of turning this data over if requested under the Freedom of Information Act punishes those most willing to comply with OFCPP's demands, breeding caution and a reluctance to exchange data. Moreover, competitors have used this information to ascertain the contractor's employment plans for the future and the areas in which the contractor is intending to expand.

9. ELIMINATE THE EXPEDITED HEARING PROCEDURES

Several witnesses suggested that OFCPP's current expedited hearings often resemble a kangaroo court, because the contractor is given insufficient time to prepare its defense and OFCCP sits as investigator, prosecutor and judge. While the concept of a speedy resolution of disputes is commendable, the existing procedures are not.

10. OFCCP'S REQUIREMENTS SHOULD NOT EXCEED TITLE VII'S STATUTORY LIMITATIONS

Several witnesses also recommended that the Executive Order should not be interpreted as declaring unlawful that which Congress has found lawful.[268] That there is even a question on this issue seems somewhat incredible. It is unconscionable that a contractor who has its

[265] See hearing record, December 8, 1981, at p. 132; July 29, 1981 at p. 5.
[266] See hearing record, July 29, 1981, at p. 63; July 30, 1981 at p. 79.
[267] October 22, 1981, at p. 445.
[268] Witnesses, Ronald Green, Dec. 8, 1981; Lawrence Lorber, Dec. 10, 1981.

seniority system approved order Title VII runs the risk of being required to remove that system because of the decision of some government employee. The purpose of Executive Order 11246 is different from that of Title VII, but this difference does not mean that the Order is beyond the law.

11. OFCCP SHOULD BE MADE PROSPECTIVE

Finally, many of the witnesses urged that OFCCP's authority should be made prospective, limited to ensuring that government opportunities of women and minorities. The agency should not be involved in the investigation, prosecution, settlement or adjudication of discrimination claims, duplicating the functions of the EEOC. The responsibility of affording retrospective relief to alleged victims of discrimination, such as front and back pay, seniority and reinstatement, is more appropriately left to EEOC and private litigants under Title VII and other statutes. Thus, all complaints of individual or class discrimination arising under the program should be referred to EEOC.[269]

On the other hand, several witnesses contended that this duplication must continue, that OFCCP must have the authority for remedying discrimination.[270] It seems that it is well understood that the presence of back pay enables the government to win concessions from contractors that could not be obtained in a court of law.

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[269] See, e.g. hearing record, July 29, 1981, at 63–65; July 29, p. 64; EEAC statement, Dec. 10, 1981.

[270] See e.g. hearing record, December 10, 1981, at p. 68.

V. CONCLUSIONS AND RECOMMENDATIONS

As noted earlier, the purpose of the study was two-fold: (1) to examine the effectiveness of the Executive Order 11246 contract compliance program and (2) to develop answers on how best to carry out the initial intent of the Order: to increase employment opportunities for women and minorities.

Complaints were heard as to the faults and merits of the existing regulatory structure, and numerous suggestions were offered on how the agency should or could operate in the future. The hearings represented one of the few times that all who had an opinion on a civil rights issue were encouraged and allowed to express their views either orally or in written statements.

It would have been easy to limit our analysis simply to the program as it is currently administered. One of the responsibilities of the Congress, however, is not just to find fault but to provide solutions. For example, OFCCP's pursuit of backpay is clearly one of the most critical legal issues affecting this program and proponents and opponents of the sanction have marshalled extensive legal and policy arguments in support of their viewpoint. After listening to all of the testimony, it would be easy to take a position based upon a personal interpretation of the existing Order but such a decision would be misplaced. The overriding obligation is not to resolve what this Order permits or prohibits but to:

1. Determine what the federal government "*ought*" to do to further our espoused national goals; and
2. Articulate what steps should be taken to achieve these goals.

OFCCP needs immediate help if it is to be effective in carrying out its mandated goal of improving opportunities for women and minorities. Many of its policies are meaningless and counterproductive, and its staff frequently has been insensitive and capricious in discharging its responsibilities. Yet the purpose behind the Executive Order is as important today as it was when it was first promulgated and demands bipartisan support. It is the program as it has evolved that needs to be changed. What follows are fourteen substantive and procedural recommendations that will help to revitalize this program. They are premised, however, upon three critical presumptions:

1. that this nation's commitment to ending employment discrimination is as strong today as it was during the passage of the Civil Rights Act of 1964;
2. that a similar commitment exists to the original intent of Executive Order 11246; and
3. that the problems of the 1980's can not be solved by blind reliance on the popular solutions of the 1960's.

If we accept these premises, then it follows that a new Executive Order must be issued which is conceptually sound and repsonsive to the needs of the eighties. If that step is not taken, Congress must pass

the legislation it has avoided for so long and enact a statutorily based federal contract compliance program. By doing so, Congress can provide the needed leadership to revitalize our governmental institutions instead of letting them become atrophied on the perceptions of the 1960's.

A. EEOC Needs To Be Strengthened

Any series of proposals on how the Executive Order program should be structured must be premised upon there being a strong and effective EEOC. Recently, steps have been taken to insure that during those times of government-wide reductions that the Commission's budget is kept constant and is not reduced. If EEOC is to be the federal government's principal enforcer of Title VII and other anti-discrimination statutes, however, its role must be increased and consideration should be given to shifting some of the monies earmarked for OFCCP to the Commission.

B. Reaffirmation That the Purpose of the Contract Compliance Program Is To Increase the Number of Employment Opportunities for Minorities and Women

To insure that its contribution is unique and of value, the purpose of the contract compliance program must be directed at the one problem that is ignored under existing policy—the need to increase the number of minorities and women in the labor pools from which individuals are hired to fill job openings. The entire orientation of the program toward hiring and promotion goals will be worthwhile only if minorities and women are able to gain or develop the necessary skills to be hired or promoted. Otherwise, the program will simply be a meaningless paperwork gesture.

C. The Contract Compliance Program Must Be Prospective

The duplication of responsibility and effort by OFCCP and EEOC must stop. The latter should be the only federal agency responsible for remedying victims of discrimination. OFCCP's mission should be to increase the number of employment opportunities and the pool of minorities and women who are available for job openings in the private sector. Failure to comply with the program's provisions would still subject a contractor to debarment or termination of existing contracts. Such a division avoids duplication, and at the same time, strengthens both efforts by not allowing federal agencies to dilute or shirk their respective responsibilities. This does not mean, however, that federal contractors found to have discriminated will go unpunished. It simply means that the remedying of discrimination will be pursued by EEOC in a court of law, not by an Equal Opportunity Specialist over a bargaining table. Such a clear delineation of responsibility is necessary to insure that this nation's investment in affirmative action and equal employment opportunity is not being wasted on bureaucratic infighting between the two agencies. Experience has shown that a memorandum of understanding is simply that, a memorandum. A more potent line of demarcation is needed.

D. The Need For Training Must Be Given Priority

The overriding purpose of affirmative action is to increase the employment opportunities of qualified minorities and women. Title VII provides the mechanism for insuring the neutrality of employment policies. As a result, the contract compliance program should be designed to foster and encourage training. It seems rather unimportant whether this training must only benefit the contractor so long as it increases minority and female representation in the appropriate labor pools for which there are existing job openings. Serious consideration also should be given to ascertaining if other federal activities, such as the CETA legislation, can be better coordinated with the contract compliance program. The program must become an integral component of the government's training activities instead of being exclusively a function of the Employment Standards Administration.

E. An Effective Program Must Be Inclusive

To foster minority and female employment opportunities, the Executive Order program must be inclusive not exclusive, but at the same time, must not punish contractors because they are small. The burden placed on small contractors or on small facilities of large contractors can be mitigated if the regulations vary according to the size of the contractor. If inflation has made the dollar amounts impractical, then the monetary levels can be raised without altering the thresholds concerning the number of employees. Many of the new entry level employment opportunities are with small and growing contractors who could have more opportunities to hire. Moreover, non-contracting facilities or sites of federal contractors should not be covered, but if they must be, they should be reviewed only if all other contracting facilities have already been reviewed.

F. An Effective, Equitable System for Selecting Contractors for Review Must Be Adopted

Contractors should be selected for review on a worst-first basis, so long as such a criterion is based upon an analysis of the rate of change in the contractor's workforce as opposed to "snapshot" assessments of minority and female representation. Reviews should be concentrated on those contractors who are doing less than their business or industrial counterparts. Moreover, contractors or facilities which have successfully completed compliance reviews should be exempted from a subsequent review for a definite period of time, such as two years. Contractors should not be reviewed simply because they are convenient or a compliance officer does not like the employer's personnel.

Once selected for review, a contractor would be provided with an explanation of how and why it was selected. Initially, it would only need to submit its analysis of its progress under its affirmative action program. If the OFCCP determines, on the basis of a statistically valid measure, that the contractor employed minorities and women in reasonable proportion to their presence in the qualified workforce, the compliance review would end and the agency would notify the contractor or facility of such findings. If this standard is not met, the contractor would submit its entire affirmative action program and the review would proceed.

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G. The Program Should Not Exceed Statutory Requirements

The federal contract compliance program should compliment Title VII and other anti-discrimination statutes, not countermand them. OFCCP should be precluded from declaring unlawful or prohibiting conduct which has been found permissible under these statutes.

H. There Must Be Reaffirmation of Good Faith Efforts as the Standard of Compliance

The determinative standard of compliance should be the contractor's good faith efforts to achieve equal employment opportunity. If the criterion is the achievement of goals, then those goals are quotas and, as such, have no place in a federal program. Moreover, the stress should be upon constructive advice and assistance from OFCCP, rather than the present confrontational, prosecutorial approach. The object should be to help a contractor find effective ways of enhancing minority and female opportunities, not to cast blame and demand penalties. More recognition should be given to the contractor's special efforts to foster the upward mobility of minorities and women.

I. The Standards Used in the Program Must Be Flexible

Any program that intends to monitor all types of businesses, industries, or academic institutions must be capable of accommodating a variety of formats. Compliance should not be a question of strict adherence to regulations but of the success of the contractor's activities. If a contractor is succeeding in increasing minority and female employment opportunities, the size of its job groups or the structure of its workforce analysis is immaterial. Form should not predominate over substance. Moreover, ranges of acceptability should be incorporated, especially where the factors being measured are so highly subjective. Achievement of this recommendation necessitates more thorough training of agency personnel in the law, their own program's requirements, and the objectives and limitations of the Executive Order program.

J. Data Requests Must Be Based Upon an Identifiable Need and Must Be Protected

During compliance reviews, contractors should not be forced to comply with rote demands for data simply because the Employment Opportunity Specialist is uncertain as to what he or she needs to know to assess the contractor's good faith efforts. Data requests should be made sequentially, based on the identification of problem areas during the audit. If the government feels that it must turn over any data obtained during compliance reviews, then better use should be made of the onsite reviews and time should be set aside for reviewing the data during this portion of the review.

K. If Goals Are To Be Set and Utilization Measured Based Upon Availability, Then This Figure Should Represent Current Avalability Not Some Ultimate Availability

Contractors should not be expected to be in compliance with some bureaucratic notion of what availability should be if there had been no discrimination. Contractors hire and promote qualified individuals, not individuals who may become qualified at some unrectain point in the future, and it is pointless to expect contractors to reserve job openings for those who currently are incapable of performing the duties of the position. Availability must be premised upon the actual possession of requisite skills and an interest in performing the job in question. As a result, the eight factor analysis should be abandoned and replaced by a more flexible system for analyzing the size of the appropriate labor pool according to skill possession and interest.

L. Hearing Procedures Must Be Established That Insure Both Quick Resolution of Disputes and Due Process of Law

Administrative enforcement procedures should provide for the prompt resolution of disputes, but due process requirements cannot be sacrificed in the name of expediency. Time limits for case processing should avoid unnecessary delay, but should not be set at levels which make thorough preparation, trial, and consideration by the trier of fact an impossibility. In order to encourage a full treatment of issues and maximize the possibility of settlement, discovery privileges should not be restricted unnecessarily.

M. A Standard For Measuring the Program's Success Must Be Established

The value of a program designed to foster affirmative action should not be measured in terms of the monetary penalties assessed against those it regulates or the number of contractors debarred. Debarment is a measurement of failure not success. The most direct and informative measurement of the program would be the number of minorities or women trained, hired, or promoted in conjunction with affirmative action programs maintained by federal contractors.

N. A Procedure Must Be Established for Quick Termination of Unlawful or Unnecessarily Burdensome Demands by Agency Personnel

Experience has shown that OFCCP's staff has, on occasion, exceeded its authority and, yet, con[illegible]tors have no effective means for stopping this abuse without going through a debarment proceeding. A procedure must be established so that a contractor who feels that agency personnel are engaging in unwarranted activity can notify a federal ombudsman of this alleged abuse. To avoid retaliation, any such complaint would have to be kept confidential and the federal ombudsman must be capable of stopping the abuse if the complaint is found to be meritorious.

APPENDIX

SENATE LABOR AND HUMAN RESOURCES

PILOT STUDY OF OFCCP

In an effort to obtain a more generalized picture of how OFCCP conducts its compliance reviews, the Committee on Labor and Human Resources conducted a small pilot survey. Specifically, the Committee was interested in answers to the following questions:

1. What are the types of violations and deficiencies for which contractors that are most frequently cited?
2. What is the basis for a finding of non-compliance?
3. Were compliance reviews conducted within prescribed time frames and guidelines?
4. How do current OFCCP regulations affect the interaction between federal contractors and OFCCP representatives?
5. What are the major reasons for OFCCP conducting a compliance review?
6. To what extent are federal contractors given assistance by OFCCP in overcoming prescribed deficiencies?

Methodology:

The population was limited to federal contractors as specified by Executive Order 11246 as amended. Our sample consisted of contractors who are members of the following trade associations: American Society for Personnel Administration, Associated Builders and Contractors, Equal Employment Advisory Council, National Association of Manufacturers, National Minority Contractors Association and U.S. Chamber of Commerce.

A questionnaire was distributed to contractors through the aforementioned trade associations, during the week of August 17, 1982.

Limitations of the Study:

Records were not kept that would adequately reflect the number of questionnaires sent out in relation to the number received by the Committee. Since the objective was to obtain only a general picture, no effort was made to insure that the survey reflected a random sample of all federal contractors. Only those contractors who are members of the trade associations mentioned above had an opportunity to contribute data to this study.

Findings:

Preliminary findings indicated that contractors felt OFCCP compliance reviews were inflexible and arbitrary, imposing internal policies and procedures that were overly demanding and required submission of duplicative data. In sum, the reviews were a non-productive exercise and lacked any rapport between regulators and the regulated. In addition, contractors felt that they had little choice but to submit to the requests of each individual compliance officer, in order to minimize the possibility of an extended compliance review.

However, some 9% of the contractors who submitted questionnaires stated that OFCCP conducted a professional, well executed review. These reviews were generally short in duration and followed specified OFCCP guidelines.

The Committee received 286 questionnaries, of which 245 offered information in a form that could be used in the pilot study.

The other 21 surveys contained information for more than one review on only one questionnaire, making it impossible to distinguish between reviews. The mean contractor size was 2584 employees, with 75% of the respondents having workforces with over 300 employees. Of the 151 contractors who provided enough information to determine the duration of a review, 99 had reviews which lasted over 13 months and 64 of those lasted over 18 months.

The major reason listed for being reviewed was "other." This category can be divided into the following nine sub-categories:

C^3 Agreements	28
No Explanation	37
Routine	20
Requirement of EO 11246	20
Long time since last review	6
Class Complaint	3
Annual Review	5
Pre-award	4
Directed Review	9
Comprehensive Review	1

Noting that the "other" category creates these smaller sub-categories, the two reasons listed most often for being reviewed were: (1) having a large government contract and, (2) being a targeted industry with 58 and 47 respondents listing these reasons. The mean number of times a contractor was reviewed between January 1, 1978 and November 1, 1981, was 1.1. Of the 212 contractors who responded to the question about additional data requests, 146 or 68.4% said that they received additional requests for data after the outset of the review. The mean number of pages of material it took to fill this request was 577, with an average cost of $12,698, and 28 days being allowed to prepare the information.

OFCCP requested additional data an average of five times per review. The mean number oa pages of information it took to fill these

OFCCP requests was 554, costing $11,000, and OFCCP allowed an average of only 14 days per proceeding to fill the request. Thus, OFCCP data requests required an average of 1144 pages of material to be prepared and submitted, costing each contractor $24,000. All of this was to be completed in 14 to 28 days.

When OFCCP communicated its findings, 46.8% of the contractors surveyed indicated that they were informed either through a letter of deficienty or an oral explanation was given in an exit conference. Legal proceedings in the form of show-cause notices were begun or threatened in 43 cases, with about half of these show-cause notices being amended and sent out again to the contractor. Additional means of communicating findings by OFCCP were through a letter of conciliation (13.2%), letter of commitment (12.4%) and other, which consisted mainly of conversations by phone between OFCCP and the contractor. Contractors generally felt that OFCCP was inconcistent in the methods and findings that were communicated and that OFCCP used show-cause notices to threaten or bully them into submission.

The deficiencies listed most frequently in the survey were goals and time tables (24.4%), format (17.7%), job groups (15.4%) and availability (14.8%). Class complaints were filed in only 9.8% of the reviews and were often changed after it was discovered that there was no substance for such a charge. Deficiencies in amended show-cause notices were similar to those found in show-cause notices with the exception that problems concerning format involved a larger percentage of contractors than did deficiencies concerning goals and timetables.

Of the 245 contractors whose questionnaires could be used, 81 were found to be in compliance, yet the time frame for being found in compliance by OFCCP ranged from 3 to 16 months. Other reviews were cloased by signing conciliation agreements, letters of commitment, or by cancellation of the review. In addition, some 56 contractors have reviews that are, at this time, still unresolved; even though they were initiated prior to September 15, 1980--over 13 months ago. An additional 18 contractors have reviews that are still unresolved, which were initiated after September 15, 1980--less than 13 months ago. Of the contractors reviewed, only 25% indicated that they were offered counsel or assistance in complying with the deficiencies cited by OFCCP; 75% of the respondents stated that they were refused or failed to receive such assistance.

There were 166 contractors who offered further comments on the experiences that they had been involved in with OFCCP representatives. These encounters ranged from technical demands to long unprofitable exchanges that exceeded regulatory mandates but followed the personal agenda of the compliance officer. Of the 166 comments that were added to the questionnaires, only 19 employers felt that OFCCP was helpful and performing proficiently. The other 147 contractors felt intimidated and confused with the unprofessional manner in which compliance reviews were conducted.

Summary:

Selection by OFCCP is the initial stage of a review procedure that is costly, antagonistic and a time consuming paper chase. Contractors appear to be selected for a review more on the basis of their size or community visability than on the number of complaints filed against them.

Violations and deficiencies are so varied and inconsistent that they appear to be determined by individual OFCCP representatives rather than through regulations and guidelines.

The amount of time given to contractors to supply requested data was often unrealistic. A demand for thousands of printed pages would be presented to a contractor and only a few days, and at times, only a few hours would be given to prepare this material. As a result, hundreds of hours, often involving overtime, would be spent trying to please and appease the reviewing officials, who often seemed preoccupied by their personal biases and pet procedures. OFCCP, on the other hand, takes as much time as it desires in a review process, often failing to get back in contact with contractors to inform them of their present compliance status.

Failure to meet these demands often results in debarment procedures, frustrating any further attempt to come to a mutually acceptable conclusion. Assistance in overcoming deficiencies cited by OFCCP officials is given sparingly, though review procedures warrent cooperation and clarification.

In conclusion, the Office of Federal Contract Compliance Programs needs to reexamine the methods used to conduct compliance reviews. There is a defined need for cooperation and understanding. Regulation and enforcement need to be better coordinated and controlled so that over-zealous staff memebers do not exceed their authority and OFCCP and contractors can work together in a productive climate. Simplification of compliance manuals and training of staff are imperative.

II. Questionnaire of Covered Contractors

1. Total number of questionnaires received 245 .

2. Mean contractor size 2584 .

   a. Not specified 7 ; 2.9 % of total.

   b. 50 employees 3 ; 1.2 % of total.

   c. 51-100 employees 7 ; 2.9 % of total.

   d. 101-200 employees 22 ; 9 % of total.

   e. 201-300 employees 23 ; 9.4 % of total.

   f. Over 300 employees 183 ; 74.7 % of total.

   (This would be developed from Question 3)

3. Mean duration of compliance review 13-18 months.

   a. Number lasting less than 5 months 17 ; 11.3 % of total.

   b. Number lasting 5 to 12 months 22 ; 14.6 % of total.

   c. Number lasting 13 to 18 months 24 ; 15.9 % of total.

   d. Number lasting more than 18 months 33 ; 21.9 % of total.

   e. Number of reviews left unresolved 31 ; 20.5 % of total.

   f. Number cancelled after initiation 7 ; 4.6 % of total

   g. Number in progress less than 12 months 17 ; 11.3 % of total.

   These figures are extracted from 151 respondent's questionnaires, which offered information that allowed a time frame to be determined.

4. Reason Given by OFCCP for Conducting the Review

   a. Large government contract 58 ; 22 % of total.

   b. Targeted industry 47 ; 17.8 % of total.

c. Individual complaints 15 ; 5.7 % of total - List explanations.

d. Other 133 ; 50.4 % of total. List explanations:
None 11 ; 4.2% of total
(This would be derived from Question 4)

5. Mean Number of Reviews Facility has Undergone Since January 1, 1978 1.1 .

(This would be derived from Question 5)

6. Was Data in Addition to AAP Requested After Outset of Review 146 ; 60 % of total.
146 of 212 which was the total number that responded = 68.4%
a. Mean number of pages requested 577 .

b. Mean cost of preparation $12,698 .

c. Mean time required to prepare data 28 .

d. Summary of data requested: attached .

(This would be derived from Question 6)

7. Method OFCCP Used to Communicate Findings:

a. Finding of deficiencies letter 86 ; 23.1 % of total.

Mean number of days to respond 18 .

b. Letter of conciliation 49 ; 13.2 % of total.

Mean number of days to respond 27 .

c. Letter of Commitment 46 ; 12.4 % of total.

Mean number of days to respond 19 .

d. Show Cause Notice 43 ; 11.6 % of total.

Mean number of days to respond 22 .

Percent of (d) given an amended show cause 50 %.

e. Orally at exit conference 86 ; 23.1 % of total.

f. Other 62 ; 16.7 % of total. Explanation:

(This would be derived from Questions 7 and 9)

8. Deficiencies Cited:

   a. Job groups 80 ; 15.4 % of total.

   b. Availability 77 ; 14.8 % of total.

   c. Goals and timetables 127 ; 24.4 % of total.

   d. Format 92 ; 17.7 % of total.

   e. Posting 23 ; 4.4 % of total.

   f. Affected class 51 ; 9.8 % of total.

   g. Other 70 ; 13.5 % of total. Explanation:

   (This would be derived from Question 8)

9. Deficiencies Cited in Amended Show Cause Notice:

   a. Job groups 5 ; 5.3 % of total.

   b. Availability 10 ; 10.5 % of total.

   c. Goals and timetables 12 ; 12.6 % of total.

   d. Format 28 ; 29.5 % of total.

   e. Posting 3 ; 3.2 % of total.

   f. Affected class 3 ; 3.2 % of total.

   g. Other 34 ; 35.8 % of total. Explanation:
   A majority of the 'others' could also be classifed in format area.
   (This would be derived from Question 8)

10. Mean Number of Times OFCCP Asked for Additional Data 5 .

   a. Mean number of pages of data or tapes 554 .

   b. Mean cost of preparation $11,000 .

   c. Mean time required to prepare data 14 listed (28 for one newspaper)

   d. Summary of data requested: see attached

   (This would be derived from Question 10)

11. Total Cost of OFCCP Data Requests Other Than AAP:

   a. Mean total number of pages of data or tapes requested 1144 .

   b. Mean total cost of preparation $24,000 .

c. Mean total time required to prepare data 14 to 28

(This would be derived from Question 6 and 10)

12. Manner in which Compliance Review was Closed:

a. Found in compliance 81 ; 32 % of total.

b. Conciliation agreement 27 ; 10 % of total.

c. Letter of commitment 66 ; 26 % of total.

d. Still unresolved 56 ; 23 % of total.

e. Not specified 9 ; 3.6 % of total.
In progress, begun after November 1, 1980 17 ; 7 %
(This would be derived from Question 11)
Review cancelled, no reason given, 7 ; 2 %

13. Percentage of contractors reviewed which were offered advice, counsel or assistance in overcoming the deficiencies found in the program or move generally, in complying with its regulations 25%.

(This would be derived from Question 12)

14. Distribution of Reviews by Region:

Region 1 (Boston)	9.	Region 6 (Dallas)	14.
Region 2 (New York)	10.	Region 7 (Kansas City)	16.
Region 3 (Philadelphia)	14.	Region 8 (Denver)	5.
Region 4 (Atlanta)	50.	Region 9 (San Fransisco	22.
Region 5 (Chicago)	62.	Region 10 (Seattle)	22.
		None listed	21.

(This would be derived from Question 13)

SURVEY OF FEDERAL CONTRACTOR'S EXPERIENCES WITH OFCCP

1. Name of company (optional) _____

2. Date compliance review initiated _____

3. Number of employees _____

4. Reason given by OFCCP for conducting the review:

   A. Large government contract ( ) C. Individual complaint of discrimination ( )

   B. Targeted industry ( ) D. Other ( )

5. How many reviews has this facility undergone since January 1, 1978? _____

6. Was data other than AAP requested at the outset of the review? _____

   If so, approximately how many pages of data or tapes were requested? _____

   What was the cost of preparing this data? _____

   How long did you have to prepare this data? _____

   Describe the data that was required _____

   _____

7. Method OFCCP used to communicate findings:

   A. Findings of deficiencies letter? ( ) Number of days to respond _____

   B. Letter of conciliation? ( ) Number of days to respond _____

   C. Letter of commitment? ( ) Number of days to respond _____

   D. Show cause letter? ( ) Number of days to respond _____

   E. Orally at exit of conference? ( )

   F. Other ( ) Describe _____

   _____

8. What were the deficiencies cited?

   A. Job groups ( ) E. Posting ( )

   B. Availability ( ) F. Affected class ( )

   C. Goals and timetables ( ) G. Other ( )

   D. Format ( )

Survey of Federal Contractor's Experience with OFCCP
Page Two

9. Were you given an amended show cause notice? Yes ( ) No ( )

   If yes, give date. _____

   List findings OFCCP made in amended notice. _____

   _____

10. How many times did OFCCP ask for additional data? _____

    Approximately how many pages of data or tapes were requested? _____

    What was the cost of preparing this data? _____

    How long did you have to prepare this data? _____

    Describe the data that was required. _____

    _____

11. Manner in which compliance review was closed:

    A. Found in compliance ( )
    B. Conciliation Agreement ( )
    C. Letter of Commitment ( )
    D. Still unresolved ( )
       Date of last contact with OFCCP _____

12. Has OFCCP offered any advice, counsel or assistance in overcoming the deficiencies found in the program or more generally, in complying with its regulations? _____

13. District or regional office responsible for the review? _____

14. Any other information you feel should be brought to the attention of the committee? _____

    _____